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No. 95-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VERMONT INFORMATION PROCESSING INCORPORATED,
Petitioner,

v.

COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state has jurisdiction over mail order sales of an out-of-state company based on the seller's sporadic non-taxable activity in the state where that activity does not constitute a substantial physical presence.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.1, petitioner Vermont Information Processing, Inc. reports that it has no subsidiaries or affiliates.

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Petition for a Writ of Certiorari to the New York Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Vermont Information Processing, Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals is not yet reported, and may be found at 1995 N.Y. LEXIS 1140 (June 14, 1995). It is reprinted at pages 1a-24a of the appendix to this petition. The opinion of the Appellate Division of the New York Supreme Court is reported at 615 N.Y.S.2d 99 (App. Div. 1994). It is reprinted at pages 25a-28a of the appendix to this petition. The opinion of the State of New York Tax Appeals Tribunal, DTA No. 806207 (Jan. 21, 1993), is unreported. It is reprinted at pages 29a-47a of the appendix to this petition. The opinion of the State of New York Division of Tax Appeals, DTA No. 806207 (Feb. 27, 1992), also is unreported. It is reprinted at pages 48a-67a of the appendix to this petition.

JURISDICTION

The Court of Appeals entered its judgment on June 14, 1995. On August 23, 1995, on application of Petitioner, Justice Ginsburg extended the time in which to file the petition for writ of certiorari to and including September 26, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 8 of the United States Constitution provides in pertinent part as follows:

> The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

STATEMENT

This case presents the question whether an out-of-state mail order company, whose only contacts with the taxing state (other than mail, telephone and common carrier) are through sporadic visits of employees for non-taxable purposes, has sufficient physical presence to permit that state to impose a use tax collection obligation.

Vermont Information Processing, Inc. ("VIP"), based in Colchester, Vermont, designs and sells computer software to beverage distributors nationwide. App. 2a. During the tax period in question, software was not considered tangible personal property by New York and therefore was not subject to sales or use tax. App. 49a-50a. Incidental to its sales of software, VIP also sold hardware, *i.e.*, computers, to its beverage distributor customers. App. 51a. Computers are considered tangible personal property in New York and therefore may be subject to sales or use tax. App. 50a. As the courts below found, VIP employees visited New York customers, on average, approximately a dozen times per year "to resolve problems and give additional instructions in connection with the use of VIP software programs, and occasionally for installing software." App. 2a, 27a. These visits, for which VIP customers were

charged, were invoiced separately from the sales and were not subject to tax.[1] App. 36a. The State here claims the right to tax the hardware sales, because of the handful of non-taxable visits each year to the State. The court below agreed.

Petitioner urges that the decision below is directly contrary to this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and other decisions of this Court.

1. Vermont Information Processing, Inc.'s Business

VIP was not licensed to do business in New York State. App. 37a. It did not maintain a place of business in New York nor did it have any offices in the State. App. 27a. VIP had no employees in the State, and it did not employ salespersons to travel into New York to solicit sales there. App. 32a. Nor did VIP engage in solicitation of any kind by means of personal visits by VIP employees, agents or representatives. App. 27a.

VIP's business, for the most part, resulted from "word-of-mouth" promotion by satisfied VIP customers. App. 32a. Beverage companies who had heard of VIP's software from other beverage dealers contacted VIP to learn more about its product. *Id.* VIP representatives in Vermont then spoke to potential customers over the telephone and mailed them brochures describing VIP's software and services. *Id.*

If a beverage distributor decided to purchase VIP's software, the distributor was sent a contract by United Parcel Service ("UPS"). *Id.* After the executed contract was returned, VIP

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[1] Although the Court of Appeals noted that VIP had agreed to provide a charge-free visit to its customers "if problems necessitating the visit occurred within the first 60 days of installation," App. 15a, there is no evidence in the record that any such visits ever occurred. Significantly, the uncontroverted testimony of Howard Aiken, VIP's President, was that "[w]e charge [the customers] quite a bit to go see them." *In the Matter of the Petition of Vermont Information Processing, Inc., State of New York, Dep't of Taxation and Finance, Division of Tax Appeals*, Transcript of Hearing at 183 (June 10, 1991).

would send the beverage distributor a package containing forms to be filled out regarding the distributor's operations, including a list of its customers and products, and record-keeping systems. *Id.* The beverage distributor would then return the completed forms to VIP by UPS. From this information, VIP developed software for the distributor's beverage business. *Id.*

After VIP developed the software program, the program (contained on a computer diskette) was shipped to the customer via common carrier, and the beverage distributor would come to Vermont for training in the use of the software. App. 33a. As part of the services provided to its customers, VIP personnel were available to VIP customers by telephone to answer questions and resolve any problems that customers might be having with the software program. App. 34a. In addition, VIP "installers" — who actually were software programmers — were able to provide assistance by directly accessing the customer's computer over the telephone through the use of a modem. *Id.* A customer's program thus could be modified or corrected from Vermont, regardless of the location of the customer's business. *Id.*

For beverage distributors who wanted to use VIP's software but did not have a computer, VIP could sell computer hardware to them under "industry marketer" agreements with computer manufacturers, *i.e.*, VIP was authorized by three computer manufacturers to sell their computers solely to beverage dealers. App. 32a-33a. If a VIP software transaction included the purchase of computer hardware, the computer was shipped from the manufacturer to VIP, where VIP loaded its software onto the computer. App. 33a. VIP then shipped the computer via common carrier. Although VIP billed customers for the computers and for the installation and initial maintenance of the hardware, App. 33a-34a, the computer manufacturer — and not VIP — installed the computer at the customer's work site and performed all hardware maintenance and service. App. 34a. There is no claim in this case, nor could there be, that these activities subjected the hardware sales to taxation under the Commerce Clause.

Although VIP's policy was to discourage travel to customers' work sites as much as possible, where necessary to install or maintain software or otherwise assist the customer with the software, VIP employees would travel to its customers. App. 35a-36a. The travel and labor costs for these visits were invoiced separately from the sale of the software itself. App. 36a. It was estimated that five percent of its customer accounts required some travel, App. 27a, amounting to approximately, on average, a dozen visits per year to New York, *id.*, and that these trips were for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees. *Id.* The State claimed that these sporadic visits subjected all of VIP's hardware sales to New York customers to New York State taxation.

2. The Decisions Below

In November, 1987, the New York Department of Taxation and Finance issued to VIP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1983 through November 30, 1986. VIP filed a petition for revision of that Determination or for refund of sales and use taxes, and a hearing was held before an administrative law judge in the Division of Tax Appeals. VIP claimed, *inter alia*, that imposition of the tax collection obligation violated the Commerce Clause. App. 48a-49a, 61a. The ALJ concluded that VIP was liable for the tax. App. 65a.

On appeal, the Tax Tribunal concluded that VIP is a "vendor" within the meaning of the New York tax law, based on its incidental sales of computer hardware. App. 41a. The Tribunal then looked to whether VIP had sufficient nexus to permit New York, under the Commerce Clause, to impose an obligation on VIP to collect the State use tax for those computer sales. App. 43a-44a. To the Tax Tribunal, there was sufficient nexus because VIP "employees periodically entered New York to install or to provide maintenance for the customized computer software it sold." App. 46a. VIP invoices indicated, over a three-year period, 41 "items of travel expense or charges for site visits" in

New York for the period December 1, 1983 through November 30, 1986, which were for approximately a dozen visits to New York each year. App. 27a, 36a-37a.

Although the Tax Tribunal found that "[t]here is no correlation between the hardware installation charges and the travel or site visit charges," App. 37a, it rejected VIP's claim that, because its limited presence in New York related solely to software, for which no use tax was due, the activities of those employees should not be taken into account in determining whether sufficient nexus existed. To the Tax Tribunal, "all of [VIP's] activities in New York may properly be considered in determining whether [VIP] had a sufficient connection with New York to warrant imposition of the burden to collect the use tax." App. 46a.

The Tax Tribunal concluded that VIP's activities in New York satisfied the requirement of "substantial nexus" based on VIP's physical presence in New York. App. 47a. Although noting that the Supreme Court has not "quantified the extent of the physical presence needed," it determined that VIP's activities — those related to non-taxable software — represented more than a "slight physical presence" in New York, thereby rendering constitutional New York's use tax collection obligation. App. 46a-47a.

On appeal, the Appellate Division of the New York Supreme Court unanimously annulled the determination of the Tax Tribunal. To the Appellate Division, although the "Supreme Court did not indicate in *Quill Corp. v. North Dakota* [, 504 U.S. 298 (1992),] exactly how much contact with a state is enough to satisfy the constitutional mandate, it is clear that more than a 'slight' presence is necessary." App. 26a-27a. The court noted that VIP "has no office or other place of business, no telephone number, no employees or salespeople, and no means of delivering its products in New York . . . ." App. 27a. On-site visits are made only to approximately 5% of VIP's customers "for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees." *Id.* Although some of the invoices referenced "hardware," VIP "does not actually perform any of the hardware installation and

maintenance listed on its invoices . . . ." *Id.* To the Appellate Division, "[t]his activity, without more, does not rise to the level necessary to justify taxation." *Id.*

The New York Court of Appeals consolidated VIP's appeal with *Orvis Co. v. Tax Appeals Tribunal*, 612 N.Y.S.2d 503, (App. Div. 1994), and, with two judges dissenting, reversed the Appellate Division's holding with respect to VIP. The court first noted that in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court "for the first time explicitly made some physical presence of the vendor in the taxing State" a requirement under the Commerce Clause for charging the vendor with the duty of collecting a use tax on mail order purchases by residents of that state. App. 4a-5a. This was a "minimum connection requirement." App. 10a. In *Quill*, according to the court, the Supreme Court "begrudging[ly]" retained the *Bellas Hess* "physical presence" requirement, *id.*, a "course [that] was not adopted without some apparent reluctance." App. 8a.

According to the New York court, the reasons for the physical presence requirement in *Quill* were different from those in *National Bellas Hess*. App. 8a-9a. *National Bellas Hess* required a physical presence on the ground that it was the only basis on which an out-of-state "vendor justifiably [can] be called upon to pay its fair share of the cost of local government." App. 9a. In contrast, in *Quill*, "the *quid pro quo* for State taxation could be found in the benefits and protections the State confers in providing for a stable and secure legal economic environment for a mail-order vendor's substantial marketing efforts aimed at the taxing State." *Id.* Thus, according to the New York court, the physical presence requirement in *Quill* was based on two other grounds: first, it furnished a "bright-line test," marking the "discrete realm of commercial activity that is free from interstate taxation," and second, it satisfied the "demands of stare decisis." *Id.* Given these shifts in rationale, the New York court concluded that "[t]he true holding of *Quill*," App. 3a, "cannot be substantively construed as other than a somewhat begrudging

retention of the *Bellas Hess* physical presence requirement . . . ." App. 10a.

Accordingly, the New York court concluded that "[w]hile a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence.' And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." App. 12a (internal citation omitted).

Applying that standard to VIP, the court determined that the tax assessment against VIP was proper. There were charges for 41 trips to New York over a three-year period by VIP employees. App. 15a.[2] To the court, "VIP's trouble-shooting visits to New York vendees," together with VIP's "assurances to prospective customers that it would make such visits," had the effect of "enhanc[ing] sales and significantly contribut[ing] to VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York." *Id.* Accordingly, VIP's activities

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[2] Although the court of appeals referenced computer hardware in describing VIP employee trips to New York customers, App. 15a, the record demonstrates that the trips to New York concerned only software. The Tax Tribunal noted that, separate from the 41 invoices over a three-year period for "travel expense or charges for site visits," there were 40 invoices "show[ing] charges for items related to installation and maintenance of computer hardware and software." App. 36a-37a. The Tax Tribunal specifically found that "[t]here is no correlation between the hardware installation charges and the travel or site visit charges . . . . The invoices do not undermine the credibility of [VIP's President's] testimony that VIP did not travel to New York to install, service or maintain computer hardware." App. 37a. In fact, "[a]ny computer hardware sold by VIP was installed, serviced and maintained at the customer's business location by employees of the hardware manufacturer." App. 34a.

in New York "were, thus, definite and of greater significance than merely a slightest presence." *Id.* (citation omitted).[3]

In dissent, Judge Bellacosa, joined by Judge Ciparick, stated that the majority opinion is "telling out-of-state business that they dare not dip their toes within New York's borders without incurring New York taxes . . . ." App. 16a. But, the dissent claimed, the majority "miscasts the evolution of United States Supreme Court Commerce Clause precedents and injects confusion when a 'substantial nexus' bright line has been the guiding hallmark and jurisprudential goal . . . ." *Id.* Under the majority's decision, "sporadic sojourns into a state" would satisfy the Commerce Clause requirement of substantial nexus, App. 18a, but *Quill* made clear that such "minimum contacts" do not constitute a "substantial nexus" sufficient to satisfy the Commerce Clause. App. 17a, 18a. "[A]bsent evidence of a 'small sales force, plant, or office' (*Quill Corp. v. North Dakota*, 504 U.S. 298, 315) or '*continuous* local solicitation' (*Scripto, Inc. v.*

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[3] The case consolidated with VIP, *Orvis Co. v. Tax Appeals Tribunal*, 612 N.Y.S.2d 503 (App. Div. 1994), involved Orvis, a catalogue mail order house located in Manchester, Vermont. Like VIP, Orvis maintained no offices or stores in New York and had no salespeople residing in New York. All sales were subject to approval in Vermont. On twelve occasions over the three-year period in question, Orvis salespeople traveled to New York to call on stores not owned by Orvis. App. 2a. The Appellate Division held that Orvis lacked the requisite "substantial nexus," noting that in *Quill v. North Dakota*, the Supreme Court had increased the requisite threshold from the "slightest presence" to "substantial amounts of in-state people or property." 612 N.Y.S.2d at 505.

To the Appellate Division, these "sporadic activities in New York do not satisfy the 'substantial nexus' requirement articulated in *Quill* . . . ." *Id.* at 506. On appeal, the New York Court of Appeals rejected Orvis' claims, but remanded that case to consider "additional arguments raised by Orvis to the Appellate Division, and not considered by that Court . . . ." App. 14a. *Orvis Co. v. Tax Appeals Tribunal* is presently pending on remand before the Appellate Division.

Carson, 362 U.S. 207, 211 (1960) [emphasis added]), within New York State, imposition of the taxes at issue should be unconstitutional." App. 16a.

This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

For many years, the efforts of state taxing authorities to ignore Commerce Clause limitations on the mail order industry has required the attention of this Court.[4] This case presents another instance where review in this area is essential to correct the manifest error of the court below.

Despite the decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in this case and others, states are now claiming that economic presence and some minimal physical presence should satisfy the Commerce Clause. These arguments directly conflict with *Quill* and other decisions of this Court. This issue merits this Court's attention.

I. THE DECISION IN THIS CASE CONFLICTS WITH DECISIONS OF THIS COURT

The Commerce Clause, as this Court has recognized, addresses concerns about "the effects of State regulation on the national economy," and is designed to avoid the imposition of "state regulations that unduly burden interstate commerce." *Quill*, 504 U.S. at 312-13. To avoid these burdens, this Court repeatedly has held that a tax can only be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977); *see Quill*, 504 U.S. at 312-15; *Tyler Pipe Industries, Inc. v. Washington State Dep't of*

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[4] Early cases in the state tax area relied on a fairly interchangeable standard under the Commerce Clause and the Due Process Clause. *See Quill*, 504 U.S. at 312. In *Quill*, this Court made clear that the Commerce Clause imposes more stringent limitations than the Due Process Clause. *Id.* at 313.

Revenue, 483 U.S. 232 (1987). The decision below does not satisfy this requirement.

A. This Court Consistently Has Held That A Use Tax Collection Obligation Requires A Substantial In-State Physical Presence Of The Out-of-State Vendor

Where mail order sales are concerned, this Court consistently has permitted states to impose use tax collection obligations only on those out-of-state vendors with a substantial physical presence in the taxing state. *See, e.g., Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939) (upholding imposition of sales tax where out-of-state vendor had salespersons in the taxing state); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) (upholding imposition of sales tax where out-of-state vendor had retail stores in the taxing state). The "farthest constitutional reach" of a state's power to impose a tax on an out-of-state vendor, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 754, 757 (1967), is represented by this Court's decision in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). There, this Court held that a use tax collection obligation could be imposed on an out-of-state vendor with "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation" in the taxing state. *Id.* at 211.

Where, however, the out-of-state vendor's physical presence in the state is sporadic and insubstantial, this Court has held that, consistent with the Constitution, use tax cannot be imposed. For example, *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), rejected the imposition of a use tax where the out-of-state vendor was present in the state on an occasional basis to make deliveries with its own truck. Indeed, in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), this Court expressly rejected the notion that the "slightest presence" of a mail order seller in the state would satisfy the physical presence rule. *Id.* at 555-56.

This line of cases culminated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 754 (1967). The Court noted that it had "never held that a State may impose the duty of use tax

collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." *Id.* at 758. Such vendors are sharply distinct from those with "retail outlets, solicitors, or property" within the taxing state. *Id.* Accordingly, this Court held that physical presence is required in order to impose a use tax obligation on an out-of-state vendor. *Id.*

Despite the unequivocal *National Bellas Hess* requirement of physical presence, in the years following that decision, various states pursued an aggressive collection strategy, urging that the Court's decision was economically and legally outmoded. *See, e.g., North Dakota v. Quill Corp.*, 470 N.W. 2d 203 (N.D. 1991), *reversed*, 504 U.S. 298 (1992); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied*, 501 U.S. 1223 (1991). In *Quill*, the North Dakota Supreme Court went so far as to decline to follow *Bellas Hess* because "the tremendous social, economic, commercial, and legal innovations" of the past quarter-century have rendered its holding "obsolet[e]," 470 N.W. 2d at 208. In addition to the growth of the mail order business since *Bellas Hess*, the North Dakota Supreme Court focused on the changes in the "legal landscape." *Id.* With respect to the Commerce Clause, it concluded that *Complete Auto Transit v. Brady*, 430 U.S. 274, indicated that the physical presence nexus of *Bellas Hess* was no longer required.

This Court granted certiorari in *Quill* and reaffirmed its holding that physical presence is required under the Commerce Clause in order for a state to impose a use tax collection obligation on an out-of-state vendor. North Dakota raised two arguments in *Quill*. First, it argued that economic nexus is sufficient to satisfy the Due Process and Commerce Clauses, and therefore that *Bellas Hess* should be overruled as outmoded and obsolete. Second, claiming that Quill in fact had some property present in the state in the form of computer software, North Dakota argued that the Commerce Clause requirement should be relaxed to make anything more than communication by "mail or common carrier" constitute the requisite "physical presence."

This Court rejected both arguments, and reaffirmed the "bright-line rule" of *Bellas Hess* for Commerce Clause purposes.

B. The Decision Below Directly Conflicts With This Court's Decisions Requiring Physical Presence

Under the "bright-line rule" of *National Bellas Hess*, which was reaffirmed in *Quill*, "physical presence" is a constitutional prerequisite to the imposition of a sales or use tax on an out-of-state vendor. *National Bellas Hess*, 386 U.S. at 758; *Quill*, 504 U.S. at 310-11. A vendor with no physical presence in the taxing state "lacks the 'substantial nexus' required by the Commerce Clause." *Quill*, 504 U.S. at 311.

The court below, while appearing to accept the first part of the Court's holding in *Quill* — that economic nexus cannot substitute for physical presence — effectively rejected the second part of the Court's holding in *Quill* — that the Commerce Clause requires a substantial physical presence in the taxing state. Although purporting to adhere to the notion that the physical presence must be more than the "slightest presence" (App. 12a), the New York Court characterized this Court's retention of the physical presence requirement as "somewhat begrudging," App. 10a, and acted almost as if *Quill* had never been decided. Thus, under the decision below, virtually any physical presence, even if minimal, sporadic and unrelated to the transactions the state seeks to tax, would be sufficient under the Commerce Clause. The decision below "tell[s] out-of-state businesses that they dare not dip their toes within New York's border without incurring New York taxes . . . ." App. 16a (Bellacosa, J., dissenting).

The decision of the New York Court of Appeals is thus in direct conflict with several decisions of this Court.

First, in determining that any physical presence beyond mail or common carrier in the state violates the "bright-line rule" of *Bellas Hess* and gives rise to use tax liability, the decision below directly conflicts with this Court's decision in *Quill*. As noted above, in *Quill*, the mail order vendor there had some physical presence in the State. In addition to Quill's common-carrier

contacts with the State, it also licensed software to some of its clients in the State, with Quill's computer diskettes therefore physically present in the State. The State in *Quill* argued that this presence satisfied the physical presence requirement. *See* Brief for Respondent State of North Dakota at 45-47, *Quill v. North Dakota*, 504 U.S. 298 (1992) (No. 91-194).

This Court rejected North Dakota's claim, stating that while the physical presence of the diskettes in the State "might constitute some minimal nexus," it was not sufficient to satisfy the "substantial nexus" requirement of the Commerce Clause. *Quill*, 504 U.S. at 315 n.8. This Court noted that it had previously "expressly rejected a 'slightest presence' standard of constitutional nexus." *Id.* (quoting *National Geographic Society v. California Bd. of Equalization*, 430 U.S. at 556). In this case, the court below, while purporting to adhere to this precedent, essentially rejected it in holding that the requisite nexus may be found even where the out-of-state vendor has only minimal and sporadic presence in the state. But, as the dissent recognized below, the nature and extent of VIP's activities in New York are "less 'substantial' than all previous cases where 'substantial nexus' has been found to exist." App. 23a.

Indeed, the court below utterly misconceived the "bright-line rule." It is not a bright line dividing mail and common carrier contacts with the State from all other contacts. Rather, it is a bright line that divides physical presence from a vendor's insubstantial in-state activities and its out-of-state activities. As this Court recognized in *Quill*, "whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." 504 U.S. at 315.

Thus, in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), this Court expressly rejected the claim that the "slightest presence" of a mail order vendor in the State was sufficient to satisfy the Commerce Clause. There, National Geographic maintained two full-time, fully-staffed offices in the State. Although the offices were wholly unrelated to

National Geographic's mail order sales, they were "a much more substantial presence than the expression 'slightest presence' connotes." 430 U.S. at 556.

Likewise, the decision below conflicts with *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). There, the out-of-state seller was physically present in the taxing state through its occasional deliveries (using its own truck, rather than a common carrier) of the goods purchased out-of-state by residents of the state. Despite the vendor's undisputed presence in the state, the Court determined that, even under the more lenient Due Process Clause, the requisite nexus was lacking. But, under the standard applied by the court below, the out-of-state vendor in *Miller Bros.* would be subject to a use tax obligation, based solely on its sporadic presence in the taxing state.

Second, by equating the "substantial nexus" requirement of the Commerce Clause with the minimum contacts requirement applicable to the Due Process Clause, the decision below conflicts in a second way with *Quill*. According to the New York Court of Appeals, *National Bellas Hess* set forth a "minimum connection physical presence requirement," a standard that the New York court viewed as "begrudgingly" retained by this Court in *Quill*. App. 10a.

Significantly, in *Quill*, this Court made clear that the substantial nexus requirement of the Commerce Clause was wholly separate from and, significantly, far more stringent than the "minimum contacts" standard for the Due Process Clause. Specifically, the Court stated that "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Quill*, 304 U.S. at 313. By effectively equating the two standards, the New York Court of Appeals has eliminated the protection accorded interstate commerce under the Commerce Clause.

The decision below is all the more remarkable in this regard because VIP's physical presence in New York does not even satisfy the more lenient due process requirement. To the court

below, although the limited physical presence of VIP in New York was wholly unrelated to the taxable transactions at issue, that limited presence still constituted sufficient nexus. This holding is inconsistent with this Court's due process jurisprudence.

While the conduct of sporadic activities in a state directly related to the subject of the litigation may be sufficient to sustain jurisdiction, *see, e.g., Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 447-48 (1952), where the activity is unrelated, far more is required. Thus "activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." *Keeton v. Hustler Magazine*, 465 U.S. 770, 779 (1984); *see Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 319 (1945)) ("an essential criterion . . . is . . . the 'quality and nature' of the defendant's activity"). Personal jurisdiction based on unrelated activities may be found only if the defendant is carrying on in the forum "a continuous and systematic, but limited, part of its general business," and this presence must be substantial. *Keeton v. Hustler Magazine*, 465 U.S. at 779 (internal quotation omitted).

Given the necessity, for due process purposes, of a connection between a cause of action and in-state activities where the activities are insubstantial, the stricter Commerce Clause standard, *see Quill*, 112 S. Ct. at 1913, requires at least as much. Thus, in virtually all of this Court's cases where the requisite nexus was present, the out-of-state seller either had in-state stores with some relation to the mail order business or it had in-state solicitors. For example, where the out-of-state mail order seller maintained retail stores in the taxing state, *see, e.g., Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359; *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941), or where the sales by the out-of-state company were arranged by local agents in the taxing state, *see Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62; *General*

Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), the requisite Commerce Clause "substantial nexus" was present.

Third, in another closely related area, this Court has recognized that in-state activities virtually identical to those involved here are not a sufficient predicate for taxation. In *Quill* itself, the Court acknowledged that Congress has "followed a similar approach in its regulation of state taxation" in enacting Pub.L. 86-272 (codified at 15 U.S.C. § 381). *Quill*, 504 U.S. at 316 n.9. As this Court explained, in enacting that statute, Congress prohibited states from imposing a net income tax on a person whose "only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled . . . outside the State." *Id.* (quoting 15 U.S.C. § 381). In *Wisconsin Dep't of Revenue v. Wrigley Co.*, 112 S. Ct. 2447 (1992), the Court held that in-state "recruitment, training, and evaluation" of sales representatives and "use of hotels and homes for sales-related meetings" were not sufficient to give rise to tax liability under Pub.L. 86-272. *Id.* at 2449. In the mail order context, similar in-state activities and certainly the lesser, insubstantial levels of in-state activity present here, should not give rise to liability.

Certiorari should be granted to correct the Court of Appeals' begrudging and inaccurate interpretation of this Court's decision in *Quill* and in view of the conflicts between the decision below and other decisions of this Court.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT SHOULD BE RESOLVED BY THIS COURT

Although *Quill* was intended, with its broad reaffirmation of *Bellas Hess*, to put the question of physical presence to rest once and for all, state efforts to impose sales and use taxes on

out-of-state mail order vendors have not abated.[5] As a result, the issue in this case — the substantiality of the physical presence necessary to satisfy the Commerce Clause — has continued to be pressed by commentators and before state administrative boards and state courts since this Court's decision in *Quill*.

Commentators have recognized that conflicting interpretations of *Quill* have led to continued litigation. *See, e.g.*, W. Carl Spining, *Forcing Mail-Order Houses To Collect Use Taxes in the Wake of Quill Corp. v. North Dakota*, 60 Tenn. L. Rev. 1021, 1035 (1993). Recently, the Multistate Tax Commission issued Proposed Nexus Guidelines for States, which would permit imposition of a sales and use tax even if the out-of-state vendor is not physically present in the state. *See* Multistate Tax Commission, *Nexus Guideline for Application of a Taxing State's Sales and Use Tax to a Remote Seller* (draft of Jan. 25, 1995). Under the proposed guidelines, a vendor can be "deemed physically present," for example, by maintaining a private contract telecommunications linkage in the state. *Id.* at 4-5.

While to date only a few cases have reached state appellate courts, a conflict has already resulted. In *Florida Dep't of Revenue v. Share International, Inc.*, the Florida Court of Appeals held that the physical presence in the state three days each year of the out-of-state seller's president and vice president, at a convention at which the seller's products were displayed and sold, did not satisfy the substantial nexus requirement of the Commerce Clause. The Florida court rejected the "argument that once an out-of-state vendor crosses the 'bright-line' established in *Bellas Hess* by doing anything more than communicate with its customers by mail or common carrier that it will be liable to the taxing state to collect its sales or use tax." No. 93-4093, 1995

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[5] Since this Court's decision in *Quill*, states have also applied other forms of taxes on out-of-state corporations lacking a physical presence in the state. *See, e.g., Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E. 2d 13 (S.C.), *cert. denied*, 114 S.Ct. 550 (1993) (application of state income tax in absence of physical presence).

Fla. App. LEXIS 8839, *11 (Fl. Dist. Ct. App. Aug. 21, 1995). Thus, the Florida court, unlike the New York court, did not hold that *Quill* permits imposing a sales or use tax if the mail order vendor does anything more than have mail and common carrier presence in the state. Nor did the Florida court hold that limited, sporadic presence in the state — even where connected to the activity for which the tax was imposed — satisfied the "substantial nexus" requirement.

Resolution of this issue is important in light of the potential for massive retroactive tax liability on individual companies which have relied in good faith on this Court's decision in *Quill*. It would also serve the interests of states which require certainty as to the permissible scope of their taxing jurisdiction. Such certainty permits states to order their financial affairs.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September 26, 1995

COURT OF APPEALS OF NEW YORK

No. 138, No. 139

In the Matter of Orvis Company Inc., Respondent-Appellant, v. Tax Appeals Tribunal of the State of New York et al., Respondents, Commissioner of the New York State Department of Taxation and Finance, Appellant-Respondent.

In the Matter of Vermont Information Processing Inc., Respondent, v. Tax Appeals Tribunal of the State of New York, Respondent, Commissioner of Taxation and Finance of the State of New York, Appellant.

Orvis Co. v. Tax Appeals Tribunal of the State of New York

June 14, 1995, Decided

No. 138: Opinion by Judge Levine. Chief Judge Kaye and Judges Simons, Titone and Smith concur. Judge Bellacosa dissents and votes to affirm in a writing in which Judge Ciparick concurs.

No. 139: Opinion by Judge Levine. Chief Judge Kaye and Judges Simons, Titone and Smith concur. Judge Bellacosa dissents and votes to affirm in an opinion in which Judge Ciparick concurs.

LEVINE, J.:

On these appeals, the State Commissioner of Taxation and Finance seeks to overturn two decisions of the Appellate Division[1] holding that Vermont vendors of products purchased by New Yorkers for use in this State were immunized from the duty

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[1] *Matter of Orvis Co. v Tax Appeals Tribunal of State of N.Y.*, 204 AD2d 916; *Matter of Vermont Information Processing, Inc. v Tax Appeals Tribunal of State of N.Y.*, 206 AD2d 764.

to collect State compensating use taxes (Tax Law § 1110) under the Commerce Clause (US Const, Art I, § 8) of the Federal Constitution. Petitioner Orvis Company, Inc. (Orvis) sells, at both retail and wholesale, camping, fishing and hunting equipment, casual and outdoor clothing and food and various gift items. Orvis' retail sales were almost entirely through mail-order catalog purchases shipped from Vermont by common carrier or the United States mail. Orvis also sold merchandise at wholesale to New York retail establishments. Concededly, Orvis employees visited New York retailers to whom it sold merchandise during the three year audit period.

Relying upon *Quill Corp. v North Dakota* (504 U.S. 298, 112 S Ct 1904), the Appellate Division held that in the absence of a substantial physical presence by Orvis personnel in New York, the imposition of the duty to collect use taxes from its New York mail-order purchasers contravened the Commerce Clause. The Court concluded that Orvis' "sporadic activities in New York" failed to meet the substantial physical presence standard and, therefore, the assessment of the tax was invalid (204 AD2d, at 918).

Petitioner Vermont Information Processing, Inc. (VIP) markets computer software and hardware to beverage distributors in New York and elsewhere throughout the United States. In most instances, its customers' orders were filled through shipments by common carrier or United States mail. An audit of VIP's invoices and sales records, however, showed visits by its employees to New York customers to resolve problems and give additional instructions in connection with the use of VIP software programs, and occasionally for installing software. The Appellate Division again concluded that those activities were insufficient to constitute the requisite substantial physical presence of VIP in this State and annulled the determination assessing the tax.

We do not read *Quill Corp. v North Dakota* to make a *substantial* physical presence of an out-of-State vendor in New York a prerequisite to imposing the duty upon the vendor to

collect the use tax from its New York clientele. The Appellate Division erroneously applied that exacting standard in both cases.

I.

The true holding of *Quill Corp. v North Dakota* can best be understood by considering the case in the context of its position in the evolution of Supreme Court doctrine limiting the authority of a State to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce. The constitutional limitations on such authority have been derived from two sources. The first is the Due Process Clause of the Fourteenth Amendment, pertaining to the jurisdiction to tax, or the "taxing power", of a State (*Wisconsin v J.C. Penney*, 311 U.S. 435, 445). The second source is the so-called "dormant" or "negative Commerce Clause, by virtue of which the constitutional grant of power to Congress "to regulate commerce * * * among the several states" (US Const, Art I, § 8, cl 3) has been interpreted as implicitly prohibiting, even in the absence of Congressional regulation, unduly burdensome or discriminatory State taxation of transactions or entities engaged in interstate commerce (see, *Oklahoma Tax Commn. v Jefferson Lines, Inc.*, 514 U.S. ____, ___, 115 S. Ct. 1331, 1335-1336 [Apr. 3, 1995]; *Quill Corp. v North Dakota, supra*, 504 US, at ____; 112 S Ct, at 1911).

Under its Due Process clause analysis, the Supreme Court has fashioned a requirement that, for a State to validly tax an interstate commercial activity, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (*Miller Bros. Co. v Maryland*, 347 U.S. 340, 344-345; *see, Moorman Mfg. Co. v Bair*, 437 U.S. 267, 272).

As to Commerce Clause challenges, one strand of earlier cases applied a formalistic approach prohibiting the imposition of what the Court deemed a "direct" tax on interstate commerce (*see, Spector Motor Serv., Inc. v O'Connor*, 340 U.S. 602; *Freeman v Hewitt*, 329 U.S. 249). Except for such taxes found to directly burden interstate commerce, the Court recognized that the

Commerce Clause did not "relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business" (*Western Live Stock v Bureau of Revenue*, 303 U.S. 250, 254). Accordingly, other forms of nondiscriminatory taxation on interstate transactions were permitted. A nexus was required, however, between the taxing state and the entity, property or activity it sought to tax.

Little difficulty was encountered in finding the required local nexus with respect to sales and compensating use taxes. In *McGoldrick v Berwind-White Coal Mining Co.* (309 U.S. 33), the vendor's responsibility to collect the tax on the sale of coal by a Pennsylvania producer to a New York City purchaser was upheld because "the tax is conditioned upon a *local activity*, delivery of goods within the state upon their purchase for consumption" (*id.*, at 58 [emphasis supplied]).

Until *Quill Corp. v North Dakota*, the constitutionally required nexus between the taxing State and the activity, entity or property subject to the tax was applied indistinguishably for purposes of both Due Process and Commerce Clause analysis, *i.e.*, a definite link or minimum connection (see, *National Bellas Hess, Inc. v Department of Revenue of Illinois*, 386 U.S. 753, 756-757; *Scripto, Inc. v Carson*, 362 U.S. 207, 210-211). Some physical presence of the vendor in the taxing State was noted as a factor justifying the imposition of the sales and use tax collection obligation. In *Felt & Tarrant Mfg. Co. v Gallagher* (306 U.S. 62) that presence was found in the foreign seller's engagement of two non-employee commissioned sales agents to solicit orders and the rental of office space for them. In *Scripto, Inc. v Carson* (*supra*), ten wholly commissioned non-employee "advertising specialty brokers" (*id.*, at 209), retained on a part-time, nonexclusive basis to solicit sales, constituted a sufficient physical connection.

In *National Bellas Hess, Inc. v Department of Revenue of Illinois* (386 U.S. 753), the Court for the first time explicitly made some physical presence of the vendor in the taxing State a requirement under both the Commerce and Due Process Clauses

for charging the vendor with the duty of collecting a use tax on mail-order purchases by residents of that State. Physical presence within the taxing State was required, irrespective of the degree to which the vendor may have availed itself of the benefits and protection of the taxing State in other ways, such as by "regularly and continuously engaging in 'exploitation of the consumer market' of [that State]" (*id.*, at 762 [Fortas, J., dissenting] [quoting *Miller Bros. Co. v Maryland, supra*]). In *Bellas Hess*, the vendor's patronage in the taxing State was exclusively through mail-order purchases, and its only contact with its customers was by way of the United States mails or by common carrier.

The Court in *Bellas Hess* gave three reasons for requiring the vendor's physical presence in the taxing State: (1) without some physical presence, there would be no fair basis for making interstate commerce bear a share of the cost of local government; (2) a contrary rule would require the Court "to repudiate *totally* the *sharp* distinction", relied upon by State taxing authorities, between mail order sellers with local outlets or solicitors and "those *who do no more* than communicate with customers in the state by mail or common carrier as part of a general interstate business" (386 US, at 758 [emphasis supplied]); and (3) permitting imposition of the duty of collection of the tax in that case would subject national mail order businesses to oppressive administrative and record-keeping burdens "in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government'" (*id.*, at 759).

As reflected in the cases following *Bellas Hess*, the requirement of the vendor's physical presence in the taxing State was not unduly exacting. In *Standard Pressed Steel Co. v Washington Dept. of Revenue* (419 U.S. 560), the Court upheld the assessment of a Washington State gross receipts tax on a foreign vendor's sales to the Boeing Company against Due Process and Commerce Clause challenges. The Court found a sufficient vendor's physical presence in the State to justify the tax in the person of a single resident engineer-employee who operated out of his home in Seattle and whose responsibilities were to consult

with Boeing on anticipated needs for the vendor's parts in Boeing's aircraft manufacturing process and to follow up on shipping or other problems in using the vendor's product (*id.*, at 562-563). In *Goldberg v Sweet* (488 U.S. 252), at issue was Illinois' imposition of a five percent excise tax on interstate telephone calls which the taxing statute required to be collected by long-distance telephone carriers, such as GTE Sprint Communications (Sprint), through their billings. Sprint challenged the tax, but it and the other parties did not contest (and the Court agreed) that the local nexus requirement was met because the tax was restricted to telephone calls originating or terminating in Illinois and charged to an Illinois service address (*id.*, at 263). In concluding that a sufficient local nexus existed, the Court did not inquire further into the extent of Sprint's physical presence in the State.

Two other decisions are significant for their articulation of the criteria to determine whether a given tax imposed on interstate commercial activity passes constitutional muster under the Commerce Clause. In *Complete Auto Transit v Brady* (430 U.S. 274), the Court repudiated the artificial and confusing formalistic distinction between direct and indirect taxes on interstate commerce, and overruled *Spector Motor Service v O'Connor* (*supra*) and *Freeman v Hewitt* (*supra*). It explicitly confirmed its agreement with the approach of the alternative line of decisions (some of which we have discussed), such as *Western Live Stock v Bureau of Revenue* (303 U.S. 250, *supra*). The Court characterized those decisions as having "considered * * * the practical effect [of the taxing statute] and sustained * * * the tax * * * when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State" (430 US, at 279). The Complete Auto articulation of the four-pronged standard for determining the validity of a State tax on interstate commercial activity under the dormant Commerce Clause remains the prevailing test, with refinements, to this day (see, *Oklahoma Tax*

Commn. v Jefferson Lines, Inc., *supra*, 514 US, at ____, 115 S. Ct., at 1337, *supra*).

One such refinement of *Complete Auto* was made at the same term in *National Geographic Socy. v California Bd. of Equalization* (430 U.S. 551). There the Court upheld a use tax collection obligation with respect to interstate mail order sales of the Society from its District of Columbia home office, on the basis of the physical presence of two National Geographic magazine advertising sales offices in the taxing State. The Court made two significant rulings: (1) the required nexus with the taxing state need not necessarily be directly related to the activity being taxed, "but [could] simply [be] whether the facts demonstrate 'some definite link, some minimum connection, between [the taxing State] and the person it seeks to tax'" (*id.*, at 561 [quoting *Miller Brothers v Maryland*, *supra*] [emphasis supplied]); and (2) the required physical presence of the vendor in the taxing State must be more than the "'slightest presence'" (*id.*, at 556).

II.

It is with the foregoing decisional evolution of negative Commerce Clause doctrine by the Supreme Court in mind that we turn to *Quill Corp. v North Dakota* (504 U.S. 298, 112 S Ct 904, *supra*). *Quill Corp.*, like *National Bellas Hess*, involved a vendor exclusively engaged in a mail-order business with substantial patronage in the taxing State, but whose only connection with its customers in that State was by common carrier or the United States mail. The Supreme Court of North Dakota held, nonetheless, that social, technological, economic, commercial and legal changes since *Bellas Hess* was decided rendered the holding in that case obsolete. The North Dakota Court concluded that physical presence was no longer necessary in the case of a mail-order vendor who systematically directed its marketing efforts at the taxing State. The State Supreme Court pointed out that North Dakota had expended significant resources to create and nurture an economic climate supporting a demand for Quill's products, had provided a legal infrastructure that protected and secured Quill's financial interests, and had disposed as waste

many tons of Quill's catalogs and promotional materials mailed to the State. Therefore, the North Dakota Supreme Court reasoned, the Commerce Clause should not bar making Quill pay its fair share for those benefits and protections it received from the State. The United States Supreme Court noted that it was thus confronted with a pull in one direction from the approach emphasized in *Complete Auto Transit* adjudging a State tax for Commerce Clause purposes based upon economic realities and practical effects, and the opposing magnetism of stare decisis. "Having granted certiorari * * * we must either reverse the State Supreme Court or overrule *Bellas Hess*. *While we agree with much of the State court's reasoning*, we take the former course" (504 US, at 301-302 [emphasis supplied]).

In actuality, however, the Supreme Court in *Quill* adopted a middle course. It overruled so much of *Bellas Hess* as required some physical presence of the vendor as a "minimum connection" in the taxing State to support the jurisdiction to tax under the Due Process Clause (504 US, at 306, 307-308).[2] However, the Supreme Court in *Quill* elected to adhere to the *Bellas Hess* precedent requiring some physical presence of an interstate mail-order vendor in the taxing State for validity under the Commerce Clause. This course was not adopted without some apparent reluctance. Thus, the Court stated that, "while contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto*" (504 US, at 311). It further stated, "*[a]lthough we agree with the State Court's assessment* of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer good law" (504 US, at 314 [emphasis supplied]).

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[2] Because minimum physical presence in the taxing State is no longer required to support jurisdiction to tax under the Due Process Clause, the authority of *Miller Bros. Co. v Maryland* (374 U.S. 340), a pure due process case — heavily relied upon by the dissent — is considerably weakened.

The rationale of the Supreme Court in *Quill* for continuing to require the physical presence of the vendor in the taxing State, however, was not the same primarily relied upon in *Bellas Hess*, that only by requiring a physical presence in the taxing State can the vendor justifiably be called upon to pay its fair share of the cost of local government. The Supreme Court agreed with the North Dakota Supreme Court's conclusion that, under the more "flexible" approach of current Commerce Clause jurisprudence (504 US, at 314), the *quid pro quo* for State taxation could be found in the benefits and protections the State confers in providing for a stable and secure legal economic environment for a mail-order vendor's substantial marketing efforts aimed at the taxing State. Rather, the justification for continuing to require a physical presence of the vendor in the taxing State was based on two other grounds. First, *Bellas Hess* furthers the ends of the Commerce Clause by furnishing a "'bright-line' test[]" (504 US, 314), a "demarcation of a discrete realm of commercial activity that is free from interstate taxation" (*id.*). The *Bellas Hess* rule, thus, serves to assure tax immunity to "vendors 'whose *only connection* with customers in the (taxing] State is by common carrier or the United States mail'" (*id.* [emphasis supplied]). Such a bright-line demarcation benefits national commerce by avoiding the litigation-provoking controversy and confusion of imprecise constitutional standards, and fosters investment by settling expectations (*id.*). Second, adherence to the *Bellas Hess* physical presence requirement satisfies the especially applicable demands of stare decisis. "The *Bellas Hess* rule has engendered substantial reliance and has become part of a basic framework of a sizable industry. The interest in stability and orderly development of the law' that undergirds the doctrine of stare decisis' * * * therefore counsels adherence to settled precedent" (504 US, at 317).

III.

As the foregoing discussion demonstrates, both the literal language of the *Quill* decision and consideration of its place in the evolution of Supreme Court Commerce Clause jurisprudence refute the Appellate Division's conclusion, urged by Orvis and

VIP here, that "*Quill* * * * *increased* the requisite threshold of in-State physical presence from any measurable amount of in-State people or property to *substantial amounts* of in-State people or property" (204 AD2d, at 917 [emphasis supplied]). *Quill* simply cannot be read as equating a substantial physical presence of the vendor in the taxing State with the substantial nexus prong of the *Complete Auto* test, as the Appellate Division's interpretation would require.

First, neither in *Bellas Hess* nor in the cases preceding it, or succeeding it up to *Quill* did the Court express any insistence that the physical presence of the interstate vendor be substantial for a valid taxation of sales of or imposition of a use tax collection duty upon the vendor. *Bellas Hess* itself, in requiring the vendor's physical presence, explicitly stated that it was applying a definite link or minimum connection requirement, which was the then prevailing nexus standard for both Due Process and Commerce Clause analysis in interstate commerce taxation cases (*see*, *supra*, 386 US, at 756-757, *supra*). Surely as a matter of simple logic and semantics, the Supreme Court was not applying a *substantial* physical presence requirement when it upheld the State tax on the in-State activity of the interstate vendor in the following cases: *Felt & Tarrant Mfg. Co. v Gallagher* (306 U.S. 62, *supra*) (two non-employee commissioned sales solicitors); *Scripto, Inc. v Carson* (362 U.S. 207, *supra*) (10 part-time non-employee nonexclusive, commission sales brokers); *Standard Pressed Steel Co. v Washington* (419 U.S. 560, *supra*) (one engineer-consultant operating an office out of his home); *Goldberg v Sweet* (488 U.S. 252, *supra*) (an interstate long-distance telephone carrier's billing to an in-State service address for calls originating or terminating in the taxing State).

As we have shown from the Court's own expressions in *Quill*, rather than expanding upon the *Bellas Hess* minimum connection physical presence requirement, the *Quill* decision cannot be substantively construed as other than a somewhat begrudging retention of the *Bellas Hess* physical presence requirement — a "result", as the Court in its opinion remarked, "not dictated * * *

were the issue to arise for the first time today" (*Quill Corp. v North Dakota, supra*, 504 US, at 311, *supra*).

Even more importantly, acceptance of the thesis urged by Orvis and VIP — that *Quill* made the substantial nexus prong of the *Complete Auto* test an in-State substantial physical presence requirement — would destroy the bright-line rule the Supreme Court in *Quill* thought it was preserving in declining completely to overrule *Bellas Hess*. Inevitably, a *substantial* physical presence test would require a "case-by-case evaluation of the actual burden imposed" (504 US, at 315) on the individual vendor involving a weighing of factors such as number of local visits, size of local sales offices, intensity of direct solicitations, etc., rather than the clear-cut line of demarcation the Supreme Court sought to keep intact by its decision in *Quill*. Thus, ironically, the interpretation of *Quill* urged by the vendors here would undermine the principal justification the Supreme Court advanced for its decision in that case, the need to provide certainty in application of the standard and with it, repose from controversy and litigation for taxing States and the nearly $ 200 billion-a-year mail-order industry, with respect to sales and use taxes on interstate transactions.

Finally, confirmation that the Supreme Court never intended to elevate the nexus requirement to a substantial physical presence of the vendor can be found in *Oklahoma Tax Commn. v Jefferson Lines, Inc.* (514 U.S. _____, 115 S. Ct. 1331, *supra*), the Supreme Court's most recent pronouncement in the interstate sales and use tax field. In that case, the Court did not apply a substantial physical presence test, but instead strictly utilized the substantial nexus prong of the *Complete Auto* test without even passing reference to the substantiality of the physical presence of the vendor (an interstate bus company) in the taxing State. Relying upon landmark cases decided before *Quill*, the Court focused on the in-State activity involved in the taxed transaction, such as the site of the origination or consummation of the transaction the State sought to tax (*see, id.*, 514 US, at 1338 [citing *McGoldrick v Berwind-White Coal Mining Co., supra*, 309 U.S. 33; *Goldberg v Sweet, supra*, 488 U.S. 252]). "Oklahoma

is where the ticket is purchased, and the service originates there. These facts are enough for concluding that 'there is nexus aplenty here'" (*id.*, 514 U.S. at __, 115 S. Ct., at 1338).

We think the foregoing survey of the decisional law discloses the true import of the physical presence requirement within the substantial nexus prong of the *Complete Auto* test under contemporary Commerce Clause analysis. While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a "slightest presence" (*see, National Geographic Society v California Bd. of Equalization*, 430 U.S. 551, *supra*). And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf.

IV.

Applying the foregoing standard for a vendor's physical presence in the taxing state we think is required under *Quill Corp.* and *Bellas Hess*, we conclude that there was substantial evidence to support the State Tax Appeals Tribunal's determination that the activity of Orvis and of VIP in this State were sufficient to impose the obligation to collect compensating use taxes on their taxable retail sales to New York customers. Neither Orvis nor VIP sustained its definite burden of establishing immunity under the Commerce Clause from that tax collection obligation (*see, General Motors Corp. v Washington*, 377 U.S. 436, 441; *Norton Co. v Dept. of Revenue*, 340 U.S. 534, 537), nor their general burden under our case law of proving sufficient facts to overcome an assessment and to demonstrate that the determination of the State Tax Appeals Tribunal was clearly erroneous (*Matter of Grace v New York State Tax Commission*, 37 NY2d 193, 195-196).

In a March 1981 written response to an inquiry from a State Sales Tax auditor, Orvis' treasurer described its operations in New York as follows: "Some salesmen who reside in Vermont travel into New York to call on non-Orvis owned stores. These salesmen in no way bind the Orvis Co., all orders are approved

in Vermont." A subsequent audit of Orvis' records disclosed that during the three years under audit, Orvis' annual sales to New York customers varied from $ 1 million to $ 1.5 million, about 15% of which consisted of wholesale purchases made by from nine to 16 unaffiliated New York retail establishments. Contrary to the holding of the Appellate Division, the foregoing evidence supported a reasonable inference by the Tax Appeals Tribunal that Orvis' substantial wholesale business in this State was generally accomplished by means of its sales personnel's direct solicitation of retailers through visits to their stores in New York, subject only to approval of all orders in Vermont.[3] This sales activity in New York would presumptively suffice as a nexus to impose a use tax collection responsibility (*see, Felt & Tarrant Mfg. Co. v Gallagher*, 306 U.S. 62, *supra*; *see also, National Geographic Society v California Bd. of Equalization*, 430 U.S. 551 [required vendor's presence need not directly relate to the taxed activity]).

It was not unreasonable for the Tribunal to give little if any weight to the affidavits Orvis submitted of its president and treasurer averring that there were only 12 visits to New York retailers by Orvis personnel during the audit period and not for the purposes of sales promotion but only to discuss problems such as concerning shipping and to check on how Orvis products were displayed. It is true, as noted by the Appellate Division, that the Regulations of the State Department of Taxation and Finance authorize the submission of affidavits in lieu of oral testimony (see, 20 NYCRR 3000.10[d][1]). The existence of the regulation did not, however, prevent the Tribunal from rejecting the

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[3] A form letter Orvis sent to retail establishments showed that Orvis extended credit to wholesale purchasers and that it imposed a "minimum stocking order of $3000" upon its wholesale customers. This evidence supports the conclusions (1) that the wholesale orders from sales solicitations in New York (admitted in Orvis' March 1981 letter) were indeed substantial, and (2) Orvis, in extending credit to New York wholesale purchasers, necessarily relied upon and utilized the banking and legal systems of this State.

credibility of the affidavits submitted under the circumstances presented in this case. The fact is, on the crucial issue in this litigation, Orvis declined to expose its witnesses to cross examination by producing them at the hearing before the State Tax Appeals Tribunal. As the Tribunal also noted in discrediting the affidavits, their description of the purposes of Orvis contacts with retailers in this State was indeed inconsistent with the admissions against Orvis' interest contained in its initial response to the inquiry of New York taxing authorities. The Tribunal, in relying on the foregoing factors did not act artibrary or capriciously in concluding that the Orvis affidavits lacked credibility.

Moreover, the affidavits of Orvis' officers described the trips to New York of Orvis personnel as "in a loop", suggesting systematic visitation to all of its as many as 19 wholesale customers on the average of four times a year. This demonstrably exceeded the "slightest presence" of Orvis in New York (*National Geographic Society v California Bd. of Equalization, supra*). Without even a credible let alone cogent explanation of why the March 1981 portrayal of Orvis' sales activity physically occurring in New York was inaccurate, the State Tax Appeals Tribunal was not arbitrary or capricious in concluding that Orvis failed to meet its burden of demonstrating its constitutional immunity. We have also considered Orvis' additional objections to the assessment and penalties imposed and find them equally unpersuasive. However, additional arguments raised by Orvis to the Appellate Division, and not considered by that Court, need to be remitted to that Court for its disposition. Also before us is Orvis' cross appeal to this Court seeking recovery of attorney's fees. Inasmuch as Orvis has not succeeded on the merits of its constitutional challenge to the tax assessment, it has no entitlement to such fees.

There likewise was substantial evidence to support the Tax Appeal Tribunal's determination upholding the sales and use tax assessment against VIP. Evidence was submitted from which the Tribunal could reasonably infer that VIP's hardware and software sales agreements obligated it to provide a charge-free visit of a

VIP computer software installer at its beverage-distributor customer's site in New York if problems necessitating the visit occurred within the first 60 days of installation. Moreover, VIP's invoices showed charges for travel expenses to its New York customers' locations on 41 occasions, in order to resolve the more intractable problems involving its computer hardware and software, during the three year audit period, in which VIP had 154 taxable transactions in New York. There was ample support in the record for the State Tax Appeals Tribunal's finding that VIP's trouble-shooting visits to New York vendees and its assurances to prospective customers that it would make such visits enhanced sales and significantly contributed to VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York. VIP's activities in New York were, thus, definite and of greater significance than merely a slightest presence (*see, Standard Steel Co. v Washington Revenue Department, supra*, 419 U.S. 560, 562 (in-State presence of a single employee of vendor "made possible the realization and continuance of valuable contractual relations between the (interstate vendor and its customer)"]). As with Orvis, we find VIP's additional objections to the assessment and penalties equally without merit.

Accordingly, the judgment in *Matter of Orvis Company v Tax Appeals Tribunal of State of New York* should be modified in accordance with the opinion herein, and the matter remitted to the Appellate Division for consideration of issues raised but not reached at that Court. The judgment in *Matter of Vermont Information Processing, Inc. v Tax Appeals Tribunal of State of New York* should be reversed, and the determination of respondent Tax Appeals Tribunal reinstated and confirmed and the petition dismissed, with costs.

BELLACOSA, J. (dissenting):

Because we agree with the Appellate Division's grant of the respective petitions to annul the determinations of the Tax Appeals Tribunal, we respectfully dissent and vote to affirm in each case.

The Court is unanimous that the governing constitutional standard is "substantial nexus" of the taxpayer's business activities to the taxing State and not "substantial physical presence." Judge Ciparick and I conclude, however, that the minuscule, infrequent activities in New York by the two Vermont vendors do not satisfy the "substantial nexus" threshold requirement imposed by the Commerce Clause of the United States Constitution (art I, § 8, cl 3), and the governing interpretations promulgated by the United States Supreme Court.

It seems to us that the majority's articulation miscasts the evolution of United States Supreme Court Commerce Clause precedents and injects confusion when a "substantial nexus" bright line has been the guiding hallmark and jurisprudential goal. Functionally and commercially, telling out-of-state businesses that they dare not dip their toes within New York's borders without incurring New York taxes is not the teaching of the United States Supreme Court cases. Rather, deterring interstate traffic in such respects by taxation is precisely what is forbidden under the mantle of the Commerce Clause. Thus, absent evidence of a "small sales force, plant, or office" (*Quill Corp. v North Dakota*, 504 U.S. 298, 315), or "*continuous* local solicitation" (*Scripto, Inc. v Carson*, 362 U.S. 207, 211 [emphasis added]), within New York State, imposition of the taxes at issue should be unconstitutional.

The question devolves to whether Orvis Co., Inc. and Vermont Information Processing, Inc., businesses not authorized and not doing business in New York, nevertheless by their minimal acts or course of business venturings arising out of sporadic commercial transactions in New York, entangled themselves in New York State's wide taxing web.

A State may not tax the economic activity of a foreign business engaged in interstate commerce unless "the tax is applied to an activity with a *substantial nexus* with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (*Complete Auto Transit, Inc. v Brady*, 430 U.S. 274, 279 [1977]

[emphasis added]). The Supreme Court has repeatedly applied this principle in subsequent cases, most recently in *Oklahoma Tax Commn. v Jefferson Lines, Inc.*, 514 U.S. __, __, 115 S. Ct 1331, 1338 [April 3, 1995]). The present cases turn solely on the first prong, *i.e.*, whether New York has a substantial nexus with the interstate activities of these two Vermont businesses to sustain a New York State sales and use tax.

A precise appreciation and reflection of the precedential building blocks is essential in this highly technical field. In *National Bellas Hess, Inc. v Dept. of Revenue of Illinois* (386 U.S. 753 [1967]), the State of Illinois sought to impose a use tax on National, a mail order business with its principal place of business in Missouri. National did not own any real property, maintain an office, sales house or warehouse in Illinois, and it did not have any agents, salespeople or other type of continuous representation in Illinois. National's only link to Illinois was via the United States mail or a common carrier.

Under Illinois statute, National was required to collect and pay to the State a tax imposed upon Illinois consumers who purchase the company's goods for use in the State. National argued that the tax created an unconstitutional burden upon interstate commerce. The Supreme Court ruled in favor of the putative taxpayer. The Court declared that "if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation" (*id.*, at 759). In 1992, the Supreme Court ruled in *Quill Corp. v North Dakota* (504 U.S. 298, *supra*) that *Bellas Hess* was still valid, operative and consistent with its decision in *Complete Auto Transit, Inc. v Brady* (430 U.S. 274, *supra*).

Quill settled two important facets of the rules. First, the nexus requirements of the Due Process and Commerce Clauses are not the same. Thus, a foreign corporation may engage in "minimum contacts" to satisfy the Due Process Clause, but still lack "substantial nexus" to support a State's taxing reach under the Commerce Clause. Second, the imposition of the duty to collect

sales and use taxes on a foreign corporation is subject to a physical presence or functional equivalent requirement. The Court stated:

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges: Whether or not a State may compel a vender to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office. This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly established the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.* * * [A] bright line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals (citations omitted) (*Quill*, *supra*, at 315-316).

New York's approach, now approved by this Court in the instant two cases, contradicts that rationale, certainty and the bright-line approach. It allows businesses to be tax-nicked at the "edges." Notably, *Quill* excludes from interstate taxation commercial activities which are not based on the physical presence of a "small sales force, plant, or office" in the taxing State (*id.*, at 315). Accordingly, sporadic sojourns into a state will not supply an adequate nexus to overcome the Commerce Clause protection (*compare*, *Miller Bros. Co. v Maryland*, 347 U.S. 340,346-347 [a Due Process Clause case]).

We disagree with the majority's suggestion that *Miller Bros. Co. v Maryland* (*supra*) is essentially irrelevant (Majority opn, at Il, n2). *Miller* required the demonstration of "some definite link, some minimum connection, between a state and the person * * * or transaction it seeks to tax" (347 US, at 344-345), and the Supreme Court ruled not to allow the imposition of the use tax on the Delaware merchandiser (*Miller Bros. Co. v Maryland*, 347 U.S. 340, 340-345, *supra*). The case rests on a different analysis of economic exploitation of consumer markets. Thus, it retains its vitality, relevance and analogous usefulness to the distinct analysis and disposition of the instant case.

The following cases are also important to scan the full landscape. In *National Geographic Socy. v California Bd. of Equalization* (430 U.S. 551 [1977]), the Supreme Court held that the State of California's imposition of a use tax liability on the Society's mail-order operation did not violate the Commerce Clause, since the Society had *two offices* in the State of California and "activities there adequately established a relationship or 'nexus' between the [magazine] and the State" sufficient to support the tax (*id.*, at 556). Similarly, in *Standard Pressed Steel Co. v Department of Revenue of Washington* (419 U.S. 560), the State of Washington's imposition of a tax levied on Standard's unapportioned gross receipts of sales made to Boeing Company, in Seattle, was not repugnant to the Commerce Clause, since one of Standard's employees maintained an office in the State of Washington (*see also, Tyler Pipe Indus. Inc. v Washington State Dept. of Revenue*, 483 U.S. 232; *D.H. Holmes Co., Ltd. v McNamara*, 486 U.S. 24, 32). Furthermore, in *Felt & Tarrant Mfg. Co. v Gallagher* (306 U.S. 62, 64), the State of California sought to impose a use tax against an Illinois corporation. The Court upheld the imposition of the tax where the Illinois corporation had hired two general agents to solicit sales orders in California and contracted to pay the rent of a California *office* maintained for each agent (*see also, Moorman Mfg. Co. v Bair, Director of Revenue of Iowa*, 437 U.S. 267; *General Motors Corp. v Washington*, 377 U.S. 436; *accord, Nelson v Sears, Roebuck & Co.*, 312 U.S. 359; *Nelson v Montgomery Ward & Co., Inc.*, 312 U.S. 373 [no Commerce Clause violation where sellers maintained local retail stores in taxing state]).

Importantly, in the absence of an in-state plant or office, substantial nexus has been found to exist only when the foreign vendor maintains "*continuous local solicitation*" within the taxing State (*Scripto, Inc. v Carson*, 362 U.S. 207, 211, *supra* [emphasis added]; *Miller Bros. Co. v Maryland*, 347 U.S. 340, 346, *supra*; *see, National Geographic Socy. v California Bd. of Equalization*, 430 U.S. 551,557, *supra*; *National Bellas Hess, Inc. v Dept. of Revenue of Illinois*, 386 U.S. 753,757, *supra*). In *Scripto*, a Georgia corporation sold certain mechanical writing

instruments to Florida residents. Scripto did not own or lease any office or plant in Florida. However, the corporation had written contracts with 10 sales "brokers," who were residents of Florida. The detailed contracts described the brokers as representatives of "Scripto for the purpose of attracting, soliciting and obtaining Florida customers." Although the salespeople were independent contractors, they provided Scripto with "continuous local solicitations in Florida," which satisfied the substantial nexus requirement (*Scripto, Inc. v Carson*, 362 U.S. 207,211, *supra*).

The instant cases fall neither under *Scripto* nor *National Geographic*. The majority, we respectfully suggest, focuses too narrowly on the legal relationship between Scripto and its agents, rather than on the regularity and durational aspects of the agents' economic activities in the taxing State. The latter features are dispositive and key under the legal tests in *Quill* and *Scripto*. The Supreme Court expressly stated that the fact that "the salespeople were not regular employees of [Scripto] devoting full time to its service" had no constitutional significance, because "the test is simply the *nature and extent of the activities* * * * in [the taxing State]" (*Scripto, Inc. v Carson*, *supra*, at 211-212 [emphasis added]). Highly significantly in these cases involving our application of exclusively governing Supreme Court jurisprudence is the fact that the Supreme Court itself has repeatedly stated that *Scripto, Inc. v Carson* (*supra*) "represents the furthest constitutional reach to date of a State's powers to deputize an out-of-state retailer as its collection agent for a use tax" (*National Bellas Hess, Inc. v Dept. of Revenue of Illinois*, 386 U.S. 753, 757, *supra*; *see*, *Quill Corp. v North Dakota*, 504 U.S. 298, 306, *supra*). We believe that the instant cases go "further".

Relevantly, in *General Trading Co. v State Tax Commissioner* (322 U.S. 335), a Minnesota corporation, which maintained no office or place of business in Iowa, solicited sales in Iowa by salespeople from head-quarters in Minnesota where the goods were shipped by common carrier into Iowa. The United States Supreme Court made no mention in the decision of the number of salespeople or the regularity of their excursions to solicit sales in Iowa. However, in referencing the facts of *General Trading* in

a Due Process Clause case, *Miller Bros. Co. v Maryland* (347 U.S. 340, 346, *supra*), the Supreme Court noted "that was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct *continuous local solicitation* * * * the only nonlocal phase of the total sale being acceptance of the order" (emphasis added). Indeed, it was the absence of continuous local solicitation which led the Supreme Court in *Miller Bros.* (*supra*) to hold that the State of Maryland could not impose the duty to collect a use tax on a Delaware merchandising corporation, although Miller made occasional deliveries into Maryland.

These precedents, taken together, in our respectfully tendered view, provide no constitutional hook to sustain the imposition of sales and use taxes assessed against these two Vermont vendors. The Tax Appeals Tribunal acknowledged that neither vendor maintained, leased or owned any office, distribution house or any other place of business in New York; nor do they own any tangible property, real or personal in New York; nor do they have a telephone listing in New York; nor do they have any agents or representatives stationed in New York. They, thus, have not provided New York with the key to the tax coffers box — a *substantial* nexus to New York by their activities here.

Orvis Co., Inc. submitted two affidavits to rebut the imposition of the use tax. The first affidavit, dated November 16, 1990, was signed by Leigh H. Perkins, president of the Orvis Company, Inc. Perkins stated that employees of Orvis' wholesale division visited New York retailers on a "sporadic, irregular basis." The purpose of the visits was to communicate with the retailers about problems in shipments, questions regarding display of the product, and to inspect the establishments of retailers selling Orvis products. Lastly, Perkins stated that "the purpose of these visits was not to solicit sales to retailers nor to obtain purchase orders from the retailers."

The second affidavit, dated November 19, 1990, was signed by Thomas S. Vaccaro, a vice president and the treasurer of the Orvis Company, Inc. Vaccaro's affidavit repeated many of the

same facts set forth in Perkins' affidavit, but also attached a worksheet depicting the number of trips in New York State taken by Orvis Co., Inc. wholesale division employees during the assessment period, September 1, 1977 through August 31, 1980. During the 36-month assessment period, Orvis' employees made 12 trips to New York. The State relies on a letter signed by Vaccaro, dated March 27, 1981. In that letter, Vaccaro stated that "some salesmen who reside in Vermont travel into New York to call on non-Orvis owned stores. The salesmen in no way bind the Orvis Company; all orders are approved in Vermont."

The letter and affidavits honestly acknowledge Orvis' *de minimis*, fleeting dashes into New York State. This is not the stuff of a cognizable, constitutional threshold called "*substantial* nexus," absent any of the other physical presence features of "continuous local solicitation" (*Scripto, Inc. v Carson*, 362 U.S. 207, 211, *supra* [emphasis added]; *Miller Bros. Co. v Maryland*, 347 U.S. 340, 346, *supra*). Orvis' New York drop-ins look very much like Miller's occasional deliveries into Maryland (*see, id.*), and amounted to nothing more than a "*slight*[] presence" in New York (*National Geographic Socy. v California Bd. of Equalization*, 430 U.S. 551,556, *supra* [emphasis added]).

Likewise, Vermont Information Processing, Inc. had no employees in New York, did not employ sales-people to travel into New York to solicit sales, nor did it advertise in New York or engage in direct mail solicitation. Most of VIP's customers heard about VIP's products through word-of-mouth, and it was VIP's policy to invite interested parties to Vermont for demonstrations. If a customer decided to purchase VIP's services, VIP would send a contract by United Parcel Service. The final product, whether it was an entire computer hardware system or simply computer software, was shipped to the customer via common carrier. VIP's customers were usually trained to use the programs developed for them at VIP's headquarters in Vermont. VIP's personnel were available to customers by telephone to resolve problems. In addition, if software modifications were required, VIP installers were able directly to access a customer's computer from VIP's own computer system

in Vermont through the use of a modem. In fact, during the entire assessment period, December 1, 1983 through November 30, 1986, VIP personnel made at most 41 visits to New York to service existing clients, never to solicit new customers. In our view, VIP's relatively occasional sojourns into New York State cannot represent anything more than a slight physical presence, and surely do not qualify as "continuous local solicitation." VIP, like Orvis, lacked continuous presence in New York, which is the *sine qua non* of the "substantial nexus" test.

These businesses evidently tried to conform their business practices to legitimately avoid incurring multistate taxation in accordance with the teaching of *Quill* (*Quill Corp. v North Dakota*, 504 U.S. 298,309-317, *supra*). Despite their best efforts, they are now snagged by the ever-widening net that unsettles expectations, discourages investment and legitimate interstate commercial intercourse and tears at the mantle of Commerce Clause protection.

In sum, the "nature and extent of the activities" (*Scripto, Inc. v Carson*, 362 U.S. 207, 211, *supra*) of these two Vermont vendors are less "substantial" than all previous cases where "substantial nexus" has been found to exist. If the minimal forays in these cases are sufficient for New York to tax these businesses, so, too, can every other state, municipality and political subdivision throughout the nation for minimally qualifying conduct (*National Bellas Hess, Inc. v Dept. of Revenue of Illinois*, 386 U.S. 753, 759, *supra*). Finally and intuitively, these cases present an interesting contradiction in the facts of their minimal conduct and the law of substantial nexus.

No. 138: Judgment modified, with costs to appellant-respondent Commissioner, and matter remitted to the Appellate Division, Third Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Levine. Chief Judge Kaye and Judges Simons, Titone and Smith concur. Judge Bellacosa dissents and votes to affirm in a writing in which Judge Ciparick concurs.

No. 139: Judgment reversed, with costs, and petition dismissed. Opinion by Judge Levine. Chief Judge Kaye and Judges Simons, Titone and Smith concur. Judge Bellacosa dissents and votes to affirm in an opinion in which Judge Ciparick concurs.

June 14, 1995, Decided

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT.

In the Matter of

VERMONT INFORMATION PROCESSING INC.,

Petitioner,

v.

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK et al.,

Respondents.

July 28, 1994.

Before MIKOLL, J.P., and MERCURE, WHITE, CASEY and YESAWICH, JJ.

YESAWICH, Justice.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained a sales and use tax assessment imposed under Tax Law articles 28 and 29.

Petitioner, a Vermont-based corporation, markets computer software and hardware to beverage distributors across the nation. While auditing the records of one of petitioner's New York Customers, the Audit Division of the Department of Taxation and Finance (hereinafter the Division) discovered a letter from petitioner that appeared to refer to activities, carried on by petitioner within this State, that the Division believed to be subject to sales or use tax. Petitioner refused to make its records available for an audit, but an examination of Federal and Vermont tax information led the Division to conclude that petitioner owed sales and use taxes in the amount of $513,112.11, plus penalties and interest, for the period spanning from December 1, 1983 to November 30, 1986.

In its petition seeking administrative review and revision of the assessment — which following a conciliation conference was reduced to $85,172.08 (again, exclusive of penalties and interest) — petitioner asserted that it was not a vendor, as that term is defined by the Tax Law, and was therefore not required to collect and remit sales and use taxes for any of its activities in New York. After an evidentiary hearing, the Administrative Law Judge (hereinafter the ALJ) upheld the assessment, which prior to the hearing had been further reduced to $73,275.04. Respondent Tax Appeals Tribunal upheld the ALJ's determination, finding that petitioner's distribution of brochures to prospective customers in New York satisfied the definition of a "vendor" found in Tax Law former § 1101(b)(8)(i) (in effect during the audit period), as it constituted the solicitation of business within the State, and that site visits made by petitioner's employees to customers in New York, primarily for the purpose of troubleshooting and occasionally installing software, constituted a sufficient nexus with the State to satisfy the constitutional requirements for imposing a duty to collect and remit State use taxes (*see, e.g., National Geographic Socy. v. California Bd. of Equalization*, 430 U.S. 551, 555-556, 97 S.Ct. 1386, 1389-1390, 51 L.Ed.2d 631). Petitioner thereafter commenced this proceeding, in which it seeks to have the decision of the Tribunal set aside as erroneous, illegal and unconstitutional (*see*, Tax Law § 2016).

While petitioner's activities within the State, which include the distribution of brochures to potential customers at their request, satisfy the definition of a "vendor" set forth in the Tax Law and applicable regulations (*see*, Tax Law former § 1101[b][8][i][C]; 20 NYCRR former 526.10[d]), petitioner's contention that it does not have sufficient contacts with New York to satisfy the constitutional prerequisites for imposing a duty to collect and remit use taxes is persuasive. It is settled that the Commerce Clause prohibits the imposition of such a duty upon a party having no "physical presence" in the taxing state (*Quill Corp. v. North Dakota*, ____ U.S. ____, ____ - ____, 112 S.Ct. 1904, 1912-1913, 119 L.Ed.2d 91), and although the U.S. Supreme Court did not indicate in *Quill Corp. v. North Dakota, supra*

exactly how much contact with a state is enough to satisfy the constitutional mandate, it is clear that more than a "slight" presence is necessary (*see, id.* at ____ n. 8, 112 S.Ct. at 1914 n. 8; *Matter of Orvis Co. v. Tax Appeals Tribunal*,___ A.D.2d ___, 612 N.Y.S.2d 503). Thus, if the only contact with customers in the taxing state is by mail or common carrier, or if the only physical presence within the state is an occasional visit by one or more employees, taxation is not permitted (*see, Quill v. North Dakota, supra*, ____ U.S. at ____, 112 S.Ct. at 1914; *Matter of Orvis Co. v. Tax Appeals Tribunal, supra*; *cf., Miller Bros. Co. v. Maryland*, 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744). On the other hand, if employees, agents or independent contractors are permanently stationed in the taxing state for the purpose of soliciting business or performing maintenance or repair, taxation is not proscribed (*see, Scripto, Inc. v. Carson*, 362 U.S. 207, 11, 80 S.Ct. 619, 621, 4 L.Ed.2d 660; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 64-66, 59 S.Ct. 376, 377-378, 83 L.Ed. 488). Here, it is undisputed that petitioner has no office or other place of business, no telephone number, no employees or salespeople, and no means of delivering its products in New York, nor does it advertise in New York newspapers or periodicals. Petitioner's president testified that it is not petitioner's ordinary practice to travel to its customers' places of business, and that on-site visits are only made to approximately 5% of petitioner's customers for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees. Moreover, the Division auditor's work papers, received in evidence at the hearing, when considered in light of the uncontradicted testimony of petitioner's president, who explained that petitioner does not actually perform any of the hardware installation and maintenance listed on its invoices, indicate no more than 30 or 40 of these visits to New York over a three-year period. This activity, without more, does not rise to the level necessary to justify taxation, for these visits, although perhaps slightly more frequent, are of the same character as those which were found in *Matter of Orvis Co. v. Tax Appeals Tribunal*, ____ A.D.2d ____, 612 N.Y.S.2d 503, *supra* to be inadequate to meet the "nexus" requirement established in *Quill*.

Inasmuch as petitioner has adequately demonstrated that it has no substantial "physical presence" within New York, the Division may not impose upon it a duty to collect and remit a compensating use tax for the tangible personal property it sells here (*see, Matter of Orvis Co. v. Tax Appeals Tribunal, supra*). Consequently, the determination at issue must be annulled.

ADJUDGED that the determination is annulled, with costs, and petition granted.

MIKOLL, J.P., and MERCURE, WHITE and CASEY, JJ., concur.

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
VERMONT INFORMATION
PROCESSING, INC.

DECISION
DTA No. 806207

for Revision of a Determination or for
Refund of Sales and Use Taxes under Articles
28 and 29 of the Tax Law for the Period
December 1, 1983 through November 30, 1986.

Petitioner Vermont Information Processing, Inc., P.O. Box 470, Hercules Drive, Colchester, Vermont 05446 filed an exception to the determination of the Administrative Law Judge issued on February 27, 1992 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through November 30, 1986. Petitioner appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner and the Division of Taxation each filed a memorandum of law. Oral argument, at the request of petitioner, was heard on July 23, 1992.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and thereby required to collect the taxes imposed under Article 28 of the Tax Law.

II. Whether, if petitioner was a vendor pursuant to the Tax Law, the Commerce Clause of the United States Constitution prevents New York from requiring petitioner to collect the use tax imposed by Tax Law § 1110.

III. Whether petitioner has established reasonable cause for its failure to collect and remit the use tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On November 27, 1987, the Division of Taxation ("Division") issued to petitioner, Vermont Information Processing, Inc. ("VIP"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1983 through November 30, 1986, assessing tax of $513,112.11 plus penalty and interest.

VIP is a Vermont corporation which produces and sells computer software to beverage distributors throughout the United States. During an audit of a beverage distributor located in Troy, New York, an auditor discovered a letter on VIP letterhead which indicated that VIP was making sales in New York State. As a result, the Division commenced an audit of VIP.

VIP was not registered to collect sales and use taxes on behalf of New York State. At the time of the audit, VIP contended that it was not required to register and had no duty to collect New York taxes. On that basis, it refused the Division access to its records. The Division obtained copies of VIP's Federal and Vermont income tax returns and used information from those returns to estimate New York taxable sales for the audit period of $7,330,173.00, with a use tax due on that amount of $513,112.11.

Following a conciliation conference, VIP agreed to allow the auditors to examine its records for the period December 1, 1983

through November 30, 1986. The VIP sales invoices inspected by the Division showed charges for computer hardware, charges for maintenance and installation of that hardware, charges for "site days" (days spent on the customer's business premises), travel expenses, charges for software systems and charges for the installation and maintenance of the software. The Division determined that receipts from the sale and maintenance of the software were not subject to sales or use tax. Charges associated with the sale, maintenance and installation of computer hardware were deemed to be subject to tax. Reimbursements for travel expenses incurred by VIP in connection with service provided to New York customers and charges for site days (days spent at the customer's location) were not deemed taxable by New York. The Division's review of the invoices resulted in a determination of taxable sales of $1,216,744.00. In accordance with this determination, the Division issued a conciliation order, dated September 30, 1988, reducing the tax due to $85,172.08 and sustaining the imposition of penalty. Before hearing, the Division agreed to reduce the amount of tax asserted to $73,275.04.

It is VIP's position that it had no duty to collect and remit New York State sales or use tax, and it challenges the assessment on that basis alone. It concedes that if it is finally determined that VIP was under a duty to collect the tax the amount of tax due for the audit period is $73,275.04.

VIP operates its business from its headquarters in Colchester, Vermont. It does not maintain a place of business in New York. During the audit period, it employed between 20 to 30 workers. Two or three employees were engaged in accounting and bookkeeping operations. Harold Aiken, the president of VIP, and another employee were involved in sales. Approximately four employees were identified as installers. Workers in these positions gathered information from customers regarding the customer's computer system, recordkeeping and business operations. The installers (essentially computer programmers) then adapted VIP computer software to the needs of the customer. The installers also were involved in training the customers to operate the VIP programs. VIP also employed two trainers and

approximately four people to answer questions from customers by telephone.

VIP had no employees in New York and did not employ salesmen to travel into New York to solicit sales, nor did it advertise in New York newspapers or periodicals or engage in direct mail solicitation. Most of its potential customers heard about VIP through word of mouth and contacted VIP to learn more about its product. VIP representatives spoke to potential customers over the telephone and mailed them brochures describing VIP's products and services. Interested parties were invited to Vermont for a demonstration or encouraged to view an operating VIP system at the workplace of an existing VIP customer in New York.

If a beverage distributor decided to purchase VIP's services, the distributor was sent a contract by United Parcel Service ("UPS"). After execution of the contract, the customer was asked to complete a variety of forms which provided VIP with information regarding the customer's business operations and recordkeeping systems. The information supplied by the customer was used by VIP to create software suitable for that customer's particular business operations.

If a customer already possessed a viable computer system, VIP sold only the software programs and VIP's services. If a customer did not already own a computer, VIP would attempt to sell it computer hardware as well. VIP was an industry marketer, authorized by IBM to sell IBM computers to beverage distributors. Mr. Aiken described VIP's relationship with IBM as follows:

> Mr. Aiken: "They [IBM] ship equipment to me, they allow me to have 10 or 15 days credit on the equipment, and then I resell it, but I can only resell it to beverage distributors. They do all installation shippings as if it were sold by their regular representative who might be in Los Angeles. They maintain it by their own maintenance people, and the only thing I'm really doing is adding value to it, and I'm putting my software on it, setting the customer on it, training them, providing him on a

hotline service afterward and an ongoing thing for years and years."

Administrative law judge: "Does your customer have any separate contract with IBM for maintenance, for guarantees or warranties?"

Mr. Aiken: "He would have. The agreement we would have him sign is an IBM agreement, it is not a VIP agreement.... We submit the paperwork so it doesn't get lost or messed up, and he is covered under maintenance by IBM."

Administrative law judge: "And would you separately charge on your invoice for any of that?"

Mr. Aiken: "No." (Hearing Tr., pp. 76-77.)

VIP also sold computer hardware manufactured by a company named MSI and a third company. Its relationship with those companies was similar to its relationship with IBM.

If a VIP transaction included the purchase of computer hardware, the computer was mailed directly to VIP where the software was loaded, and the computer was then shipped by VIP to the customer, via common carrier. If the customer purchased only software, the program was placed on a disk which was shipped to the customer via common carrier.

We make the following additional finding of fact:

Petitioner's president testified that petitioner purchased the computer hardware from the computer manufacturers (IBM, MSI, or the third company) and resold it to petitioner's customers at prices established by petitioner. Petitioner also billed its customers for the installation and initial maintenance of the hardware. Petitioner also sold the computer manufacturer's noncustomized software which petitioner installed on the computer prior to shipping the computer to the customer.

VIP's customers were usually trained to use the programs developed for them at VIP's headquarters in Vermont. As part

of its services, VIP personnel were available to VIP customers by telephone to answer questions and resolve any problems the customer might be having with the VIP computer program. In addition, VIP installers were able to directly access a customer's computer from VIP's own computer system in Vermont through the use of a modem. A customer's computer program could be modified or corrected in this fashion, without the VIP employee leaving Vermont.

VIP personnel did not routinely travel to their customers' locales to answer questions or service customer needs. In fact, it was VIP's policy to discourage travel as much as possible. However, VIP did travel to the customer's place of business if absolutely necessary to install or maintain software or handle problems the customer was having with the software. Mr. Aiken estimated that approximately five percent of its customer accounts required some travel.

We make the following additional finding of fact:

In a small percentage of cases, petitioner's employees visited New York State to hold training sessions for customers on the use of the software programs.

VIP sold its customers on-going services, such as updating the computer programs, for which it charged a monthly fee. VIP used the terms "maintenance" and "installation" to refer to services connected with the software programs; however, VIP did not install or maintain computer hardware or send its employees to its customer's facilities for the purpose of maintaining or installing such hardware. As Mr. Aiken stated in his testimony: "When we call it installation time, that's like you and I talking, it is hours, it is not — I don't have a guy that uses a screwdriver. I don't have that" (Hearing Tr., p. 64). Any computer hardware sold by VIP was installed, serviced and maintained at the customer's business location by employees of the hardware manufacturer.

During the course of the audit, the Division obtained a variety of information which led it to believe that VIP was entering New

York to install both hardware and software at its customers' business locations and that VIP entered New York to conduct training sessions. That information consisted of a letter on VIP letterhead, VIP sales invoices, and conversations with VIP customers. Since VIP vigorously disputes the meaning and importance attributed by the Division to this information, it is necessary to review it in some detail.

(a) The Division introduced a letter dated February 13, 1985 from VIP to a Troy, New York customer. As material here, the letter summarizes computer hardware and software purchased by the customer and contains the following statements:

"PAYMENT SCHEDULE:

Due with this letter (hardware deposit 10%) (received)	3,447.90
Due at installation (hardware 90% + software)	36,481.00

You should budget one to two days at $60.00 per hour for training and installation on the computer and software, as well as actual per diem expenses. Any applicable sales, use, or excise taxes are your responsibility and should be paid to the proper authorities. All VIP charges will be billed when performed.

If John J. Bolond Dist. and VIP determine that an installer is needed on-site for additional data prep within 60 days of installation, VIP will provide that person at no charge to John J. Boland Dist."

The letter also states separate charges for the maintenance of the hardware and software.

An auditor spoke with a representative of the Troy beverage distributor. When asked the substance of that conversation the auditor stated: "They said that the representative installed the computer and trained them and that they had a seminar in Albany in March of 1987." (Hearing Tr., p. 33.)

The auditor believed that the letter provided evidence that VIP entered New York for installation and maintenance of computer hardware and training.

(b) The second document relied on by the Division was a VIP sales invoice to a customer in Athens, New York. The customer was charged for VIP travel time and expenses and for training. The invoice does not indicate where the training took place.

(c) Two other invoices to separate New York customers show charges for software, hardware, hardware maintenance, and "PC/Set Up/Test."[1]

(d) Three invoices to a Plattsburgh customer show miscellaneous travel and transportation expenses and charges for "installation." An auditor spoke with an employee of the Plattsburgh customer and was told that a VIP employee went to the business offices in Plattsburgh to "install system and train him" in its use (Exhibit "M," notation made by auditor).

(e) An invoice to an Ithaca, New York company shows the sale of hardware and software by VIP.

When reviewing the VIP invoices, the auditor made a listing of each invoice which she believed demonstrated VIP's presence in New York in connection with its sales of computer hardware and software in New York. The listing provides the following information for each such invoice: the customer name, the invoice date, the invoice number, the total invoice amount, the amount taxable by New York State, and comments. The comments section identifies those items on the invoice which the auditor construed as evidencing VIP's presence in New York. These items can be separated into two general categories: (1) items of travel expense or charges for site visits and (2) items connected with the installation or maintenance of either computer hardware or software. Approximately 41 invoices contain items

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[1] In his testimony, Mr. Aiken explained this as a charge "to set up a diskette" (Hearing Tr., p. 59).

in the first category. The remaining 40 invoices show charges for items related to installation and maintenance of computer hardware or software. There is no correlation between the hardware installation charges and the travel or site visit charges. For example, invoice number 121188 showed a $480.00 charge for installation of hardware. The auditor included the invoice in the listing of invoices showing a New York presence, presumably because she believed that a VIP employee traveled into New York to install the hardware. The comments section does not indicate that there was a charge for travel expenses, and there is not a separate invoice for travel expenses which can be correlated to the installation found on invoice number 121188. There are some instances where a charge for installation of software is found on the same invoice as a travel expense charge. Invoice number 730 showed an invoice amount of $149.01 for transportation, room, meals and PC installation. None of this was deemed taxable. The invoices do not undermine the credibility of Mr. Aiken's testimony that VIP did not travel to New York to install, service or maintain computer hardware.

After receiving access to VIP's records, the auditor listed all invoices showing sales of property or services subject to sales or use taxes. Her worksheets list approximately 154 such invoices for the audit period.

Mr. Aiken attended a seminar in New York. The subject of the seminar was New York's bottle bill. Mr. Aiken participated as a presenter at the invitation of the seminar's sponsors. The seminar was not conducted for the purpose of training VIP customers or to solicit business in New York, and it occurred after the expiration of the audit period.

VIP registered to do business in New York with the Department of State over 10 years ago. On advice from an attorney, VIP ended its registration. VIP also consulted an accountant about 10 years ago who advised VIP that it had no duty to register as a vendor in New York State or to collect New State use tax.

OPINION

In the determination below, the Administrative Law Judge concluded that: (1) petitioner was a vendor required to collect the use tax on its sales of computer hardware because it solicited business in the State, and by reason of such solicitation made sales of tangible personal property; (2) petitioner failed to meet its burden to show that it did not sell tangible personal property or perform services in New York State taxable under Article 28; (3) petitioner's presence in New York through employee business trips in combination with its other business activity in New York created a sufficient nexus between New York and petitioner to subject petitioner to the obligation to collect use tax; and (4) petitioner did not meet its burden of establishing that its failure to file sales and use tax returns for the period under audit was due to reasonable cause.

On exception, petitioner asserts that: (1) petitioner was not a vendor required to collect sales and use taxes because it did not solicit business in New York; (2) petitioner lacked sufficient nexus with New York State to require it to collect use taxes for its sales in the State as petitioner's activities in the State related solely to the sale of non-taxable products and services; and (3) no penalties should be imposed for petitioner's failure to file sales and use tax returns or to pay taxes due because petitioner relied on Technical Services Bulletin, 1978-1(S), which exempts sellers of customized software from the obligation to collect sales tax on their sales to New York customers, and because petitioner relied on the advice of a third-party accountant.

In response to petitioner's exception, the Division asserts that petitioner's sales in New York of tangible personal property taken together with petitioner's New York presence in connection with its non-taxable sales of intangible personal property and non-taxable services created sufficient nexus under the Due Process and Commerce Clauses of the United States Constitution to require petitioner to collect use tax on its sales of computer hardware to customers in New York.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1110 imposes upon all persons a compensating use tax for use within New York State of any tangible personal property purchased at retail, except to the except that such property has already been subject to sales tax. The obligation to collect the use tax is imposed upon every vendor of tangible personal property (Tax Law §§ 1131[1] and 1132[a]).

In determining whether petitioner was required to collect the taxes imposed under Tax Law § 1110, we must first determine whether petitioner was a vendor as defined by Tax Law § 1101. If it is determined that petitioner was such a vendor, we must then determine whether, under the Commerce Clause of the United States Constitution (US Const art I), sufficient nexus exists between New York and petitioner to allow the imposition of the use tax collection obligation.

Former Tax Law § 1101(b)(8)(i), which was in effect during the audit period,[2] defined a vendor as including:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by [Article 28];

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere,

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[2] Effective September 1, 1989, the statutory definition of vendor was modified. Tax Law § 1101(b)(8)(i)(C) now defines a vendor, in pertinent part, as:

"A person who solicits business . . .

* * *

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution; and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article."

to persons within the state of tangible personal property or services, the use of which is taxed by [Article 28];

(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article. . . ."

During the audit period, the Division's regulations defining a vendor, in the case of interstate vendors, provided in pertinent part:

"(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, *who solicits the sales in New York, as defined in subdivision (d) of this section*, of who maintains a place of business as defined in subdivision (c) of this section, is required to collect the sales tax on the tangible personal property delivered in New York or the services performed in New York.

"(2) A person making sales to his customers within the State, who has solicited such sales by the interstate distribution of catalogs or other advertising material by mail and who delivers the merchandise through the mail or by common carrier, and who neither maintains a place of business as defined in subdivision (c) of this section, *nor solicits business as defined in subdivision (d) of this section*, is not required to register as a vendor. However if such person registers voluntarily, he is under the same obligations as any other vendor.

* * *

"Example 3: A person makes sales entirely by catalog in this State from a point outside the State. In addition, he periodically sends repairmen, consultants and others, to maintain the merchandise he sold. He is required to register as a vendor" (former 20 NYCRR 526.10[e], emphasis added).

Soliciting business was defined in former 20 NYCRR 526.10(d) as follows:

"(d) Soliciting business. (1) A person is deemed to be soliciting business if he has employees, salesmen, independent contractors, promotion men, missionary men, service representatives or agents soliciting potential customers in the State.

"(2) A person is deemed to be soliciting business in New York if he distributes catalogs or other advertising material, in any manner in the State."

We conclude that under former Tax Law § 1101(b)(8)(i)(C) petitioner was a vendor obligated to collect the use tax imposed by Tax Law § 1131(1) on every vendor of tangible personal property. Former Tax Law § 1101(b)(8)(i)(C) requires that to be considered a vendor in New York State a person must solicit business within the State and, as a result of such solicitation, make sales to persons within the State of tangible personal property (*see also*, former 20 NYCRR 526.10[e][1]). Petitioner did both and was, therefore, a vendor required to collect the use tax on items taxed by Article 28.

Petitioner's mailing of brochures and other advertising materials to potential customers in New York State meets the definition of soliciting business under Tax Law § 1101(b)(8)(i)(C) and former sales tax regulation 20 NYCRR 526.10(d)(2). Petitioner asserts that its activities did not constitute "solicitation" of business in the State because its brochures were mailed into the State only in response to specific requests for information. In petitioner's view, these mailings should not be considered "solicitation." We disagree. Former Tax Law § 1101(b)(8)(i)(C) does not distinguish between proactive or reactive solicitation.[3] Further,

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[3] The statute states that solicitation includes the "distribution of catalogs or other advertising matter" (former Tax Law § 1101[b][8][i][C]). In addition, former sales tax regulation 20 NYCRR 526.10(d)(2) states that solicitation includes the distribution of advertising materials "*in any*

we cannot see how this would be a meaningful distinction. Regardless of how the potential customers were identified, the purpose of petitioner's mailings was clearly to obtain new customers in the State. It is, therefore, our conclusion that petitioner was soliciting business as defined by the Tax Law.

The case cited by petitioner does not support its view that petitioner's activities did not constitute "solicitation." Petitioner cites *Matter of Koffler v. Joint Bar Assoc.* (51 NY2d 140, 432 NYS2d 872, *cert denied*, 450 US 1026) to demonstrate that its activities do not constitute solicitation (Petitioner's memorandum of law, p. 6). In this case, the Court of Appeals defined "solicit" to mean "to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing" (*Matter of Koffler v. Joint Bar Assoc.*, *supra*, 432 NYS2d 872, 875, *citing Webster's Third New Intl. Dictionary* 2169 and *Black's Law Dictionary* 1248-1249 [5th Ed]). The Court in the same opinion contrasted this definition of "solicitation" with that for "advertising," which it defined as "the calling of information to the attention of the public by whatever means" (*Matter of Koffler v. Joint Bar Assoc.*, *supra*, 432 NYS2d 872, 875, *citing*, *Webster's Third New Intl. Dictionary* 31 and *Black's Law Dictionary* 50 [5th Ed.]). Petitioner has repeatedly stated that it did not advertise. However, petitioner's activities fall directly within the Court's definition of "solicitation." Petitioner's directed mailings to potential customers were certainly intended to move particular New York entities to become VIP's customers. Thus, this case further supports our determination that petitioner's activities constituted "solicitation."

The Administrative Law Judge concluded that, as a result of petitioner's solicitation activities within New York, petitioner made sales of tangible personal property consisting of the computer hardware. We agree. Petitioner asserts, however, that even if it was engaged in solicitation activities, it did not make sales in New York of tangible personal property but, rather, its

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manner."

sales were limited to sales of customized computer software and the maintenance thereof, both non-taxable activities under the Tax Law. Petitioner's claim appears to be that petitioner did not sell the computer hardware, but rather, the computer hardware was purchased by petitioner's customers from the computer manufacturer. The record below does not support this conclusion. Petitioner solicited the sales of computer hardware from its potential software customers. As part of its sales of customized software, petitioner supplied its customers, when appropriate, with the computer equipment to run the customized software. Petitioner's president testified that petitioner purchased computer hardware from IBM and other manufacturers, added the customized software and then resold the hardware with the customized software to its customers. As the Administrative Law Judge noted, petitioner's witnesses consistently spoke of these transactions as purchases by VIP and resales to its customers. While employees of the computer manufacturers installed the equipment on the customer's premises, petitioner set the price for the equipment, and billed its customers for the equipment and the costs of installation. These billing procedures further establish that these were petitioner's sales and not sales by the computer manufacturer. Thus, the Administrative Law Judge correctly concluded that petitioner sold tangible personal property in the State and that such sales were a result of petitioner's solicitation making petitioner a vendor under former Tax Law § 1101(b)(8)(i)(C).

Having determined that petitioner met the State's statutory definition of a vendor required to collect the use tax on items taxed by Article 28, we must now determine whether petitioner's activities satisfied the nexus requirement of the Commerce Clause of the United States Constitution.[4] Petitioner asserts that its

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[4] A state may have authority to tax under the Due Process clause of the Constitution as only a minimal connection with the state is required; however, the imposition of the tax may still violate the Commerce Clause because the potential taxpayer's contacts with the state are insufficient to establish nexus (*Quill Corp. v. North Dakota*, _____ US

contacts with New York State are insufficient to warrant the imposition of tax collection responsibilities.

Where a vendor's activities in the State consist solely of solicitation of customer sales and shipment of goods by mail or common carrier, the vendor's contacts with the state are insufficient to constitute nexus and an obligation to collect a state's use tax cannot be imposed on the vendor by the state (*Quill Corp. v. North Dakota*, ___ US ___, 112 S Ct 1904; *National Bellas Hess v. Department of Rev. of State of Illinois*, 386 US 753). A vendor must have a physical presence in a state before the state can impose the obligation to collect use taxes (*Quill Corp. v. North Dakota, supra*; *National Geographic Socy. v. California Bd. of Equalization*, 430 US 551; *National Bellas Hess v. Department of Rev. of State of Illinois, supra*). To date, the Court has not quantified the extent of the physical presence needed to impose such an obligation. The Court has stated, however, that the existence of a "slightest presence" within the state is not enough (*Quill Corp. v. North Dakota, supra*; 112 S Ct 1904, 1915, footnote 8; *National Geographic Socy. v. California Bd. of Equalization, supra*, at 556).

In *Quill*, the court acknowledged that the point at which nexus is found to exist is an artificial point (*Quill Corp. v. North Dakota, supra*, 112 S Ct 1904, 1914). To determine if this artificial point has been reached, a careful evaluation of the vendor's activities is required, for "[t]he test is simply the nature and extent of the activities of the [vendor] in [the state]" (*Scripto, Inc. v. Carson*, 362 US 207, 211-212; *see also, Felt & Tarrant Mfg. Co. v. Gallagher*, 306 US 62 [where, as in *Scripto*, the Court examined the activities of the vendor's salesmen and found them to establish sufficient nexus to justify imposition of use tax liability]; *Matter of Orvis, Inc.*, Tax Appeals Tribunal, January 14, 1993).

____, 112 S Ct 1904). Since we find that in this case, the Commerce Clause requirements have been met, it is unnecessary for us to separately discuss the application of the Due Process Clause.

The Court's decision in *National Geographic* is instructive as to what activities or factors should be considered in determining whether a taxpayer's presence surpasses that of a "slight physical presence." The National Geographic Society conducted an out-of-state mail order business and at the same time maintained two small offices in California that solicited advertisements for National Geographic Magazine. California sought to impose use tax obligations on the Society for its mail order sales based upon the presence of the California offices. The Society argued that the business activities of these offices were totally unrelated to the mail order sales that California sought to tax and, therefore, the Court should not take the activities of the in-state offices into account in determining whether sufficient nexus exited. This argument was specifically rejected by the Court (*National Geographic Socy. v. California Bd. of Equalization*, *supra*, at 652). The Court stated that for nexus to exist there is no requirement that, in addition to a relationship between the taxing state and the taxpayer, there be a direct correlation between the activity sought to be taxed and the taxpayer's activity in the state (*National Geographic Socy. v. California Bd. of Equalization*, *supra*, at 560). In determining whether nexus exists, the Court indicated that it is the seller's activities of whatever nature in the state which must be examined (*National Geographic Socy. v. California Bd. of Equalization*, *supra*, at 560). While the Court did not define at what point the Society's activities surpassed a "slightest presence," it did hold "that [National Geographic's] maintenance of the two offices in California and activities there adequately establish[ed] a relationship or 'nexus' between the Society and the State that render[ed] constitutional the obligations imposed upon [National Geographic] pursuant to §§ 6203 and 6204 [of the California Tax Law]" (*National Geographic Socy. v. California Bd. of Equalization*, *supra*, at 556). The Court found that the Society was subject to the California use tax because sufficient nexus existed and the Society met the statutory definition of a "retailer engaged in business in [the] state (*National Geographic Socy. v. California Bd. of Equalization*, *supra*, at 556).

Petitioner makes the same argument made by the Society asserting that, in determining if sufficient nexus exists, only in-state activities associated with taxable sales are to be examined and that, since its physical presence in the State was only related to its nontaxable sales of computer software, insufficient nexus exists. We agree with the Administrative Law Judge that, based upon the decision in *National Geographic*, "all of [petitioner's] activities in New York may properly be considered in determining whether [the petitioner] had a sufficient connection with New York to warrant imposition of the burden to collect the use tax" (Determination, Conclusion of Law "D").

In our view, petitioner's activities represent more than a "slight physical presence" in this State. While petitioner's activities in the State may be less substantial than those in *National Geographic*, we think that the "nature and extent of the activities" (*Scripto, Inc. v. Carson, supra*, at 211) of petitioner's employees in New York created a sufficient nexus to impose a use tax liability for the sale of the computer hardware. Petitioner's employees periodically entered New York to install or to provide maintenance for the customized computer software it sold.[5] The computer equipment on which the customized software was installed was either previously owned by petitioner's customers or newly purchased from petitioner in order to make use of petitioner's customized software packages. We have previously discussed that petitioner's sales of the computer hardware and software resulted from petitioner's solicitation in the State. Petitioner is, therefore, subject to the requirements of Article 28 of the Tax Law as its solicitation of customers and sales of tangible personal property qualified petitioner as a vendor under Tax Law § 1101(b)(8)(i)(C), and petitioner's physical presence by its employees installing and maintaining the computer software sold to New York customers created sufficient nexus.

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[5] Petitioner's employees also made occasional visits into the State to hold training sessions on the use of its software programs.

On the issue of penalties, petitioner has made the same arguments on exception that it made before the Administrative Law Judge. We find no reason to alter the Administrative Law Judge's determination and, therefore, for the reasons stated in that determination, we uphold the Administrative Law Judge's determination that petitioner has not established reasonable cause for the abatement of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Vermont Information Processing, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Vermont Information Processing, Inc. is denied; and

4. The Notice of Determination issued to petitioner Vermont Information Processing, Inc. on November 27, 1987 is sustained.

DATED: Troy, New York

[Jan. 21, 1993]

/s/ John P. Dugan
John P. Dugan
President

/s/ Francis R. Koenig
Francis R. Koenig
Commissioner

/s/ Marie T. Jones
Marie T. Jones
Commissioner

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of
VERMONT INFORMATION
PROCESSING, INC.

DETERMINATION
DTA No. 806207

for Revision of a Determination or for
Refund of Sales and Use Taxes under Articles
28 and 29 of the Tax Law for the Period
December 1, 1983 through November 30, 1986.

Petitioner Vermont Information Processing, Inc., P.O. Box 470, Hercules Drive, Colchester, Vermont 05446 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through November 30, 1986.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 10, 1991 at 1:15 P.M. Petitioner filed a brief on August 9, 1991. The Division of Taxation filed a brief on October 18, 1991, and petitioner filed a reply on October 29, 1991. Petitioner appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and thereby required to collect the taxes imposed under Article 28 of the Tax Law.

II. Whether, if petitioner was a vendor pursuant to the Tax Law, the United States Constitution prevents New York from

imposing a duty upon petitioner to collect the use tax imposed under section 1110 of the Tax Law.

III. Whether petitioner has established reasonable cause for its failure to collect and remit the use tax.

FINDINGS OF FACT

1. On November 27, 1987, the Division of Taxation ("Division") issued to petitioner, Vermont Information Processing, Inc. ("VIP"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1983 through November 30, 1986, assessing tax of $513,112.11 plus penalty and interest.

2. VIP is a Vermont corporation which produces and sells computer software to beverage distributors throughout the United States. During an audit of a beverage distributor located in Troy, New York, an auditor discovered a letter on VIP letterhead which indicated that VIP was making sales in New York State. As a result, the Division commenced an audit of VIP.

3. VIP was not registered to collect sales and use taxes on behalf of New York State. At the time of the audit, VIP contended that it was not required to register and had no duty to collect New York taxes. On that basis, it refused the Division access to its records. The Division obtained copies of VIP's Federal and Vermont income tax returns and used information from those returns to estimate New York taxable sales for the audit period of $7,330,173.00, with a use tax due on that amount of $512,112.11.

4. Following a conciliation conference, VIP agreed to allow the auditors to examine its records for the period December 1, 1983 through November 30, 1986. The VIP sales invoices inspected by the Division showed charges for computer hardware, charges for maintenance and installation of that hardware, charges for "site days" (days spent on the customer's business premises), travel expenses, charges for software systems and charges for the installation and maintenance of the software. The Division determined that receipts from the sale and maintenance of the

software were not subject to sales or use tax. Charges associated with the sale, maintenance and installation of computer hardware were deemed to be subject to tax. Reimbursements for travel expenses incurred by VIP in connection with service provided to New York customers and charges for site days (days spent at the customer's location) were not deemed taxable by New York. The Division's review of the invoices resulted in a determination of taxable sales of $1,216,744.00. In accordance with this determination, the Division issued a conciliation order, dated September 30, 1988, reducing the tax due to $85,172.08 and sustaining the imposition of penalty. Before hearing, the Division agreed to reduce the amount of tax asserted to $73,275.04.

5. It is VIP's position that it had no duty to collect and remit New York State sales or use tax, and it challenges the assessment on that basis alone. It concedes that if it is finally determined that VIP was under a duty to collect the tax the amount of tax due for the audit period is $73,275.04.

6. VIP operates its business from its headquarters in Colchester, Vermont. It does not maintain a place of business in New York. During the audit period, it employed between 20 to 30 workers. Two or three employees were engaged in accounting and bookkeeping operations. Harold Aiken, the president of VIP, and another employee were involved in sales. Approximately four employees were identified as installers. Workers in these positions gathered information from customers regarding the customer's computer system, recordkeeping and business operations. The installers (essentially computer programmers) then adapted VIP computer software to the needs of the customer. The installers also were involved in training the customers to operate the VIP programs. VIP also employed two trainers and approximately four people to answer questions from customers by telephone.

7. VIP had no employees in New York and did not employ salesmen to travel into New York to solicit sales, nor did it advertise in New York newspapers or periodicals or engage in direct mail solicitation. Most of its potential customers heard

about VIP through word of mouth and contacted VIP to learn more about its product. VIP representatives spoke to potential customers over the telephone and mailed them brochures describing VIP's products and services. Interested parties were invited to Vermont for a demonstration or encouraged to view an operating VIP system at the workplace of an existing VIP custom in New York.

8. If a beverage distributor decided to purchase VIP's services, the distributor was sent a contract by United Parcel Service ("UPS"). After execution of the contract, the customer was asked to complete a variety of forms which provided VIP with information regarding the customer's business operations and recordkeeping systems. The information supplied by the customer was used by VIP to create software suitable for that customer's particular business operations.

9. If a customer already possessed a viable computer system, VIP sold only the software programs and VIP's services. If a customer did not already own a computer, VIP would attempt to sell it computer hardware as well. VIP was an industry marketer, authorized by IBM to sell IBM computers to beverage distributors. Mr. Aiken described VIP's relationship with IBM as follows:

> Mr. Aiken: "They [IBM] ship equipment to me, they allow me to have 10 or 15 days credit on the equipment, and then I resell it, but I can only resell it to beverage distributors. They do all installation shippings as if it were sold by their regular representative who might be in Los Angeles. They maintain it by their own maintenance people, and the only thing I'm really doing is adding value to it, and I'm putting my software on it, setting the customer on it, training them, providing him on a hotline service afterward and an ongoing thing for years and years."
>
> Administrative law judge: "Does your customer have any separate contract with IBM for maintenance, for guarantees or warranties?"

Mr. Aiken: "He would have. The agreement we would have him sign is an IBM agreement, it is not a VIP agreement.... We submit the paperwork so it doesn't get lost or messed up, and he is covered under maintenance by IBM."

Administrative law judge: "And would you separately charge on your invoice for any of that?"

Mr. Aiken: "No." (Hearing Tr., pp. 76-77.)

10. VIP also sold computer hardware manufactured by a company named MSI and a third company. Its relationship with those companies was similar to its relationship with IBM.

11. If a VIP transaction included the purchase of computer hardware, the computer was mailed directly to VIP where the software was loaded, and the computer was then shipped by VIP to the customer, via common carrier. If the customer purchased only software, the program was placed on a disk which was shipped to the customer via common carrier.

12. VIP's customers were usually trained to use the programs developed for them at VIP's headquarters in Vermont. As part of its services, VIP personnel were available to VIP customers by telephone to answer questions and resolve any problems the customer might be having with the VIP computer program. In addition, VIP installers were able to directly access a customer's computer from VIP's own computer system in Vermont through the use of a modem. A customer's computer program could be modified or corrected in this fashion, without the VIP employee leaving Vermont.

13. VIP personnel did not routinely travel to their customers' locales to answer questions or service customer needs. In fact, it was VIP's policy to discourage travel as much as possible. However, VIP did travel to the customer's place of business if absolutely necessary to install or maintain software or handle problems the customer was having with the software. Mr. Aiken estimated that approximately five percent of its customer accounts required some travel.

14. VIP sold its customers on-going services, such as updating the computer programs, for which it charged a monthly fee. VIP used the terms "maintenance" and "installation" to refer to services connected with the software programs; however, VIP did not install or maintain computer hardware or send its employees to its customer's facilities for the purpose of maintaining or installing such hardware. As Mr. Aiken stated in his testimony: "When we call it installation time, that's like you and I talking, it is hours, it is not — I don't have a guy that uses a screwdriver. I don't have that" (transcript at 64). Any computer hardware sold by VIP was installed, serviced and maintained at the customer's business location by employees of the hardware manufacturer.

15. During the course of the audit, the Division obtained a variety of information which led it to believe that VIP was entering New York to install both hardware and software at its customers' business locations and that VIP entered New York to conduct training sessions. That information consisted of a letter on VIP letterhead, VIP sales invoices, and conversations with VIP customers. Since VIP vigorously disputes the meaning and importance attributed by the Division to this information, it is necessary to review it in some detail.

(a) The Division introduced a letter dated February 13, 1985 from VIP to a Troy, New York customer. As material here, the letter summarizes computer hardware and software purchased by the customer and contains the following statements:

"PAYMENT SCHEDULE:

Due with this letter (hardware deposit 10%) (received)	3,447.90
Due at installation (hardware 90% + software)	36,481.00

You should budget one to two days at $60.00 per hour for training and installation on the computer and software, as well as actual per diem expenses. Any applicable sales, use, or excise taxes are your responsibility and should be paid to the proper authorities. All VIP charges will be billed when performed.

> If John J. Bolond Dist. and VIP determine that an installer is needed on-site for additional data prep within 60 days of installation, VIP will provide that person at no charge to John J. Boland Dist."

The letter also states separate charges for the maintenance of the hardware and software.

An auditor spoke with a representative of the Troy beverage distributor. When asked the substance of that conversation the auditor stated: "They said that the representative installed the computer and trained them and that they had a seminar in Albany in March of 1987." (Transcript at 33.)

The auditor believed that the letter provided evidence that VIP entered New York for installation and maintenance of computer hardware and training.

(b) The second document relied on by the Division was a VIP sales invoice to a customer in Athens, New York. The customer was charged for VIP travel time and expenses and for training. The invoice does not indicate where the training took place.

(c) Two other invoices to separate New York customers show charges for software, hardware, hardware maintenance, and "PC/Set Up/Test."[1]

(d) Three invoices to a Plattsburgh customer show miscellaneous travel and transportation expenses and charges for "installation." An auditor spoke with an employee of the Plattsburgh customer and was told that a VIP employee went to the business offices in Plattsburgh to "install system and train him" in its use (Exhibit M, notation made by auditor).

(e) An invoice to an Ithaca, New York company shows the sale of hardware and software by VIP.

---

[1] In his testimony, Mr. Aiken explained this as a charge "to set up a diskette" (Transcript at 59).

16. When reviewing the VIP invoices, the auditor made a listing of each invoice which she believed demonstrated VIP's presence in New York in connection with its sales of computer hardware and software in New York. The listing provides the following information for each such invoice: the customer name, the invoice date, the invoice number, the total invoice amount, the amount taxable by New York State, and comments. The comments section identifies those items on the invoice which the auditor construed as evidencing VIP's presence in New York. These items can be separated into two general categories: (1) items of travel expense or charges for site visits and (2) items connected with the installation or maintenance of either computer hardware or software. Approximately 41 invoices contain items in the first category. The remaining 40 invoices show charges for items related to installation and maintenance of computer hardware or software. There is no correlation between the hardware installation charges and the travel or site visit charges. For example, invoice number 121188 showed a $480.00 charge for installation of hardware. The auditor included the invoice in the listing of invoices showing a New York presence, presumably because she believed that a VIP employee traveled into New York to install the hardware. The comments section does not indicate that there was a charge for travel expenses, and there is not a separate invoice for travel expenses which can be correlated to the installation found on invoice number 121188. There are some instances where a charge for installation of software is found on the same invoice as a travel expense charge. Invoice number 730 showed an invoice amount of $149.01 for transportation, room, meals and PC installation. None of this was deemed taxable. The invoices do not undermine the credibility of Mr. Aiken's testimony that VIP did not travel to New York to install, service or maintain computer hardware.

17. After receiving access to VIP's records, the auditor listed all invoices showing sales of property or services subject to sales or use taxes. Her worksheets list approximately 154 such invoices for the audit period.

18. Mr. Aiken attended a seminar in New York. The subject of the seminar was New York's bottle bill. Mr. Aiken participated as a presenter at the invitation of the seminar's sponsors. The seminar was not conducted for the purpose of training VIP customers or to solicit business in New York, and it occurred after the expiration of the audit period.

19. VIP registered to do business in New York with the Department of State over 10 years ago. On advice from an attorney, VIP ended its registration. VIP also consulted an accountant about 10 years ago who advised VIP that it had no duty to register as a vendor in New York State or to collect New State use tax.

CONCLUSIONS OF LAW

A. Section 1110 of the Tax Law imposes upon all persons a compensating use tax for use within New York State of any tangible personal property purchased at retail, except to the extent that such property has already been subject to sales tax. The obligation to collect the use tax is imposed upon every vendor of tangible personal property (Tax Law § 1131[1]). Pursuant to Tax Law former § 1101(b)(8)(i),[2] in effect during the audit period, a vendor includes:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by [article 28];

---

[2] Effective September 1, 1989, the statutory definition of vendor was modified. Tax Law § 1101(b)(8)(i)(C) now defines a vendor, in pertinent part, as:

"A person who solicits business . . .

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution; and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article."

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by [article 28];

(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogues or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article".

The Division premised its finding that VIP is a vendor and liable for collection of use tax on two grounds. First, the Division found that petitioner made sales of tangible personal property (computer hardware) in New York. Second, the Division found that VIP employees traveled to New York to perform services subject to tax under Tax Law § 1105(c)(3), specifically to install, maintain and service the computer hardware.

Petitioner denies that it sold tangible personal property in New York and contends that its employees entered New York only in connection with the servicing of computer software. Even if it did make sales of tangible personal property in New York, petitioner claims that the State cannot burden it with a duty to collect use tax because it lacks the nexus with New York required by the Commerce Clause and the Due Process Clause of the United States Constitution. In order to determine whether petitioner was a vendor under the Tax Law and to resolve the nexus issue, it is first necessary to determine the nature and extent of VIP's activities in New York as established by the evidence in the record.

B. The Division placed sufficient evidence in the record to establish that it had a reasonable basis for concluding the VIP sold tangible personal property in New York and entered New York to install and maintain that property. That evidence consisted of the letters and invoices obtained by the auditor during her audit and the auditor's conversations with two VIP customers.

Moreover, the auditor's analysis of invoices reviewed after the conciliation conference lent support to the Division's position. Accordingly, the burden was upon VIP to show by clear and convincing evidence that it did not sell tangible personal property in New York or enter New York to perform services taxable under article 28 (*Matter of Sarantopoulos*, Tax Appeals Tribunal, February 28, 1991).

C. Petitioner failed to prove that it did not sell tangible personal property in New York. VIP solicited sales in New York and by reason of that solicitation made sales of tangible personal property (computer hardware) within New York. VIP argued that the computer manufacturers, not VIP, were the actual sellers of the hardware, but the evidence establishes otherwise. In fact, VIP's witnesses consistently spoke of these transactions in terms of a purchase by VIP and a resale to VIP's customers (*see, e.g.*, the testimony of Harold Aiken in Finding of Fact "9"). VIP's contention that it did not solicit business in New York is also rejected. VIP sent brochures to potential customers in New York, negotiated sales over the telephone, and arranged for potential customers to see VIP computer systems demonstrated either in New York or Vermont. These activities constitute solicitation of business, and by reason of such solicitation VIP made sales of tangible personal property in New York. This activity alone establishes that VIP was a vendor under section 1101(b)(8)(i)(A), (C) of the Tax Law.

Petitioner proved that it performed no services in New York subject to taxation under article 28. There is no question that VIP employees traveled into New York to install computer software, solve problems related to its use and provide training; however, VIP offered the credible testimony of its president and comptroller to establish that VIP did not install, service or maintain computer hardware in New York. Their testimony established that the auditor misapprehended information shown on the invoices and letters she viewed. The confusion was caused, in part, by VIP's practice of referring to services related to the computer software as "installation". A statement on an invoice showing, for example, "PC installation" referred to the placing

of a computer program on a disk, an activity that normally occurred in Vermont. The listing of invoices made by the auditor provides no evidence that VIP employees entered New York to install or service computer hardware. Although the listing shows charges related to the hardware and charges for travel or site days, there is never any correlation between the two; that is, the invoices never show a charge for travel expenses that can be directly related to a charge for hardware installation. Thus, the invoices themselves lend credibility to the testimony of VIP's witnesses.

In its brief, the Division states: "If the content of the actual invoices differ [sic] materially from the auditor's transcription, it was the petitioner's burden to produce these records in support of its position" (Division's Brief at 4). The point here is not that the auditor did not accurately transcribe information but that she misinterpreted it. There is no independent evidence in the record that supports the auditor's interpretation, except the hearsay statements of two VIP customers (*see* Finding of Facts "15[a]" and "15[d]"). The statements themselves are ambiguous and do not clearly indicate whether the speakers were referring to the installation of computer hardware or software. Moreover, they were related by the auditor who understood the term "installation" to refer to hardware. When contrasted with the testimony of VIP's witnesses, given under oath and subject to cross-examination, those statements can carry little weight. In sum, the evidence shows that VIP employees entered New York only to service and maintain the computer software and to provide training in its use. These are not services subject to tax under article 28.

The Division determined that the receipts from VIP's computer programs and software sales were not subject to tax under article 28 because the programs were adapted and modified for each individual customer's use. Computer programs of this nature are deemed to be intangible personal property, whether directly entered into the computer or placed on disks, tapes, or transmitted by another medium (*see*, *Matter of Economic Information Systems*, State Tax Commission, May 26, 1987 [TSB-H-

87(218)S]). As an intangible product, such software does not fall within the scope of article 28. Services rendered in connection with the intangible personal property likewise are not subject to the tax imposed under article 28. Thus, VIP would not have been required to register as a vendor or to collect use tax if its *only* sales transactions involved the creation and servicing of the computer software, even if it maintained a place of business in New York.

The Division argues that it is of no significance that VIP employees serviced only the software, since the software and hardware function as a unit. It may be true that one cannot create or modify a computer program without using a computer. However, the Division itself distinguishes between software and hardware, deeming the former to be intangible personal property not subject to sales or use tax (*see*, *Answer Systems, Inc.*, Advisory Opinion, January 5, 1991 [TSB-A-91(9)S]). More importantly, the Division recognizes that the services of creating, updating and modifying the software are not taxable by article 28 even where the data or programs are "entered into a computer directly" (Department of Taxation, Technical Services Bulletin 1978-[S]; *see also*, *Answer Systems*, *supra*). Based on the fact that VIP only provided services in connection with the computer software, it is concluded that it performed no services in New York subject to New York's sales and use tax.[3]

---

[3] The Technical Services Bulletin cited indicates that compute software of a certain nature is "exempt" from sales tax. In fact, the Tax Law does not provide a statutory exemption for software of any kind. Because software (of the kind under discussion) is deemed to be intangible personal property, the receipts from sale of the software are not taxed by article 28. Inasmuch as such receipts do not fall within the scope of article 28, a person whose activities are confined to the selling of such software is not a vendor as defined by section 1101(b)(8) (*cf. Matter of Felix Industries*, Tax Appeals Tribunal, August 22, 1991 [where the Tribunal held that a vendor is not free from the duty to register because his sales, otherwise taxable under article 28, were exempted from sales tax by specific provisions of the Tax Law]).

Nonetheless, the evidence is sufficient to establish that under section 1101(b)(8)(i)(A), (C) VIP was a vendor during the audit period because it sold tangible personal property in New York.

D. The conclusion that VIP was a vendor under the Tax Law does not settle the issues raised here however. Past United States Supreme Court decisions have recognized a constitutional limitation upon a state's power to require an out-of-state seller to collect use tax (*see, National Bellas Hess v. Department of Revenue*, 386 US 753, 87 S Ct 1389, 18 L Ed 2d 505). Those constitutional limitations are reflected in the Rules and Regulations of the Commissioner of Taxation and Finance, in effect during the audit period. 20 NYCRR former 526.10(e)(2) limits the definition of a vendor, stating:

> "A person making sales to his customers within the State, who has solicited such sales by the interstate distribution of catalogs or other advertising material by mail and who delivers the merchandise through the mail or by common carrier, and who neither maintains a place of business as defined in subdivision (c) of this section, nor solicits business as defined in subdivision (d) of this section, is not required to register as a vendor."

A person is deemed to be soliciting business for purposes of the regulation if he has employees, salesmen, independent contractors or other agents soliciting potential customers in New York (20 NYCRR former 526.10[d][1]).

Quite clearly, if VIP's sales of tangible personal property in New York involved only the solicitation of sales of the computer hardware by mail and telephone and the delivery of that merchandise by common carrier, VIP would not be deemed to be a vendor under the regulation and thus would not be responsible for the collection of use tax. The issue then is whether VIP's sales of tangible personal property in New York coupled with its presence in New York to perform services *not* taxed by article 28 creates the requisite nexus which would allow New York to require VIP to collect the use tax. VIP claims that the activities it carried on in New York are insufficient to create a nexus between VIP and New York because the receipts from those

activities were not subject to sales tax and because the activities were irregular and few in number.

The opinion of the Supreme Court in *National Geographic Society v. California Board of Equalization* (430 US 551, 51 L Ed 2d 631) is especially instructive in resolving the former issue. The appellant, a not-for-profit corporation, maintained two offices in California that solicited advertising for the Society's magazine but had no connection to the Society's mail order business conducted from its headquarters in the District of Columbia. The California Supreme Court had concluded that the "slightest presence" of the seller in California established sufficient nexus between the State and the seller to support the imposition of the duty to collect use tax. The Society argued:

> "[t]hat there must exist a relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State" (*id* at 560, 51 L Ed 2d 631, 639).

The Court rejected both approaches. It surveyed the decisions in this area and concluded that:

> "[t]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection between [the State and] the *person*...it seeks to tax'." (*Id*, at 561, 51 L Ed 2d 631, 640, quoting *Miller Bros. v. Maryland*, 347 US 340, 74 S Ct 535, 539: emphasis added in *National Geographic*.)

Based on the decision in *National Geographic*, it is concluded that all of VIP's activities in New York may properly be considered in determining whether VIP had a sufficient connection with New York to warrant imposition of the burden to collect use tax. A sufficient nexus has been found to exist where local agents of the seller were present in the State and operated out of premises paid for by the seller (*Felt & Tarrant Mfg. Co.*

v. Gallagher, 306 US 62, 83 L Ed 2d 488). A state may impose the tax burden on a company maintaining retail stores in the state even if the retail stores are not directly involved in the company's out-of-state mail order business (*Nelson v. Sears, Roebuck & Co.*, 312 US 359, 85 L Ed 868). In *National Geographic*, the Court held that the Society's offices in California created sufficient nexus to subject the Society to use tax liability, although the offices had no direct relationship to the seller's mail order business (*National Geographic Society v. California Board of Equalization, supra*).

VIP's activities in New York are somewhat less substantial than those described in the cited cases. VIP does not own or lease property in New York, it does not have a telephone in New York, and it has no employees or agents in New York. Nonetheless, its activities in New York are more extensive than those of the mail-order company described in *Bellas Hess*. In determining exactly how much activity and what kind of activity is necessary to create a nexus between the State and the person it wishes to subject to use tax liability, the Supreme Court's examination in *National Geographic* of the *Bellas Hess* opinion is notable. The Court stated:

> "*National Bellas Hess, Inc. v. Illinois Rev. Dept*, (citations omitted) presented the question [of nexus] in the case of an out-of-state seller whose *only* connection with customers in the taxing State was by common carrier or mail. Illinois subjected appellant Bellas Hess, a national mail-order house centered in Missouri, to use tax liability based upon mail-order sales to customers in that State. Bellas Hess owned no tangible property in Illinois, had no sales outlets, representatives, telephone listings, or solicitors in that State, and did not advertise there by radio, television, billboards, or newspapers. It communicated with potential customers by mailing catalogues throughout the United States including Illinois, twice a year and occasionally supplemented this effort by mailing out 'flyers'. All orders for merchandise were mailed to Bellas Hess' Missouri plant, and the goods were sent to customers by mail or common carrier. *Bellas Hess* held that, constitutionally, the basis for the requisite

nexus was not to be found *solely* in Bellas Hess' mail-order activities in the State. The Court's opinion carefully underscored, however, the 'sharp distinction...between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like Bellas Hess] who do no more than communicate with customers in the State or by mail or common carrier as part of a general interstate business.'" (*National Geographic Society v. State Board of Equalization*, *supra* at 559, 51 L Ed 2d 631, 639, quoting *Bellas Hess v. Illinois Rev. Dept.*, *supra* at 1392; emphasis added.)

The Court made one other observation pertinent to this determination. It noted that the only burden placed on the out-of-state seller by the compensating use tax is an administrative one of collecting and remitting the tax. The out-of-state seller becomes liable for the tax only if it fails or refuses to collect it from consumers whose "identification as a resident of the taxing State is self-evident" (*id.* at 558, 51 L Ed 631, 639).

VIP conducted a substantial amount of business activity in New York. Its sales of taxable items amounted to $1,216,744.00 during the audit period. In addition, it had sales of nontaxable goods and services in an undetermined amount. Undoubtedly, its sales in New York were increased and enhanced by its activities in New York. It was able to promise its potential customers that an installer would visit New York to solve any problems with the systems purchased (Finding of Fact "15[a]"). VIP systems operating at the offices of existing customers in New York were used to demonstrate the VIP product to potential New York customers (Finding of Fact "7"). VIP communicated regularly with existing new York customers over telephone lines, either in the traditional manner or by computer linkage (Finding of Fact "12"). Petitioner claims that the actual number of times its employees visited New York were too infrequent to create a definite link between New York and VIP. The VIP invoices show approximately 41 trips into New York during the audit period based upon charges to its customers for site days and travel expenses (Finding of Fact "6"), and the auditor's workpapers show approximately 154 taxable transactions in New

York during the same period. Thus, the actual number of times a VIP employee visited New York is not insignificant in relationship to its sales in New York. More importantly, these visits to New York were significantly connected with VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York. Therefore, it is concluded that VIP's presence in New York through its installers' visits to this State created a sufficient nexus between New York and VIP to subject VIP to use tax liability.

E. Petitioner seeks abatement of penalties on the ground that it had reasonable cause for believing that it was not liable for use taxes. Petitioner contends that reasonable cause is shown by the following facts: (1) petitioner's primary business is the creation of software which is an activity not subject to tax under article 28; (2) petitioner informed its customers that they were responsible for payment of any taxes due; (3) petitioner believed that IBM was collecting and remitting sales taxes on sales in New York State; (4) petitioner maintained no offices or employees in New York and did not advertise in New York; (4) petitioner consulted an accounting firm which advised it that it had no use tax liability in New York. At hearing, petitioner's attorney argued that this case is one of first impression and that "if nexus is determined in this case it will be as far as the State of New York has ever gotten" (transcript at 87). He argued that a penalty should not be imposed on petitioner in such a case.

Petitioner was assessed penalty under section 1145(a)(1)(i) of the Tax Law which provides for imposition of penalty whenever any person fails "to file a return or pay over any tax...within the time required by or pursuant to [article 28]". Section 1145(a)(1)(iii) allows for abatement of penalty where the petitioner has established that such failure was due to reasonable cause and not due to willful neglect. The taxpayer bears the burden of establishing reasonable cause as well as the absence of willful neglect (*see, e.g., Matter of T.V. Date, Inc.*, Tax Appeals Tribunal, March 2, 1989).

In determining whether reasonable cause exists, an important factor to consider is the extent of the taxpayer's efforts to ascertain its tax liability (*see Matter of John Grace & Co.*, Tax Appeals Tribunal, May 9, 1990; *see also*, 20 NYCRR 536.5[d][1], [2]). Reliance on the advice of a tax professional is not necessarily grounds to support a finding of reasonable cause (*Matter of Auerbach v. State Tax Commn.*, 142 AD2d 390, 536 NYS2d 557). Here, there was testimony that petitioner consulted with an accounting firm and was advised that it had no use tax liability. However, there was no evidence to show exactly what facts were presented to the tax advisor or to establish the nature and extent of the inquiry made and advice given by the advisor. The cancellation of penalties on the basis of the mere allegation that an accountant's advice was sought would eviscerate the penalty provisions altogether (*see, Matter of LT & B Realty v. State Tax Comm.*, 141 AD2d 185, 535 NYS2d 121, 123).

Petitioner's contention that it believed that either IBM or its customers were remitting any sales taxes that might be due to New York tends to demonstrate willful neglect rather than reasonable cause. A vendor cannot delegate its statutory duty to collect and remit tax. Petitioner's reliance on others, who also may have had a duty to pay tax, does not demonstrate that petitioner made a good faith effort to ascertain its own tax liability.

Finally, the fact that New York's courts have not ruled on a case presenting the same set of facts as those presented here is not a sufficient basis to establish reasonable cause.[4] In order to establish reasonable cause, the taxpayer must show that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (*Matter of A & V Crown*, Tax Appeals

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[4] This determination is based on the law that existed during the audit period. There is no attempt here to restrict nexus requirements or to anticipate future Supreme Court decisions (*see, e.g., Heitkamp v. Quill Corp.*, 470 NW2d 203, *cert granted* ___ vs ___, 112 S Ct 49, 116 L Ed 2d 27).

Tribunal, May 24, 1990; *see also*, 20 NYCRR 536.5[d][2]). There is no such showing here. For example, petitioner did not contact the Division to ask its interpretation of the law or seek an advisory opinion of the Commissioner. In the absence of such inquiries, petitioner failed to prove that its actions did not constitute willful neglect.

F. The petition of Vermont Information Processing, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes as modified by agreement of the parties (Findings of Fact "4" and "5") is sustained.

DATED: Troy, New York

[FEB. 27, 1992]

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE

No. 95-506

Supreme Court, U.S.
FILED
OCT 20 1995
CLERK

IN THE

Supreme Court of the United States

October Term, 1995

VERMONT INFORMATION PROCESSING INCORPORATED,

Petitioner,

against

COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of Question Presented

Whether this Court should grant certiorari to review a decision of the New York Court of Appeals holding that the physical presence in New York of petitioner, a Vermont corporation, provided sufficient "nexus" with New York under the Commerce Clause of the United States Constitution to justify imposing upon petitioner the obligation to collect New York compensating use tax on its sales of more than $1 million in computer hardware to customers in New York, when petitioner used its willingness to come to New York to provide services for its software customers as a selling point, and actually came to New York to provide such services on more than forty separate occasions, in connection with more than one-quarter of its overall sales in New York, during the three-year audit period at issue.

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No. 95-506

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

VERMONT INFORMATION PROCESSING INCORPORATED,

Petitioner,

-against-

COMMISSIONER OF TAXATION AND FINANCE OF THESTATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Petitioner Vermont Information Processing, Inc. ("VIP") is a company based in Colchester, Vermont and engaged in the business of designing and selling computer software and hardware to beverage distributors, including distributors located

in New York State (150, 178, 202).[1] As of 1987, VIP was not registered with New York State as a vendor for sales and use tax purposes (190). In 1987, while performing a sales tax audit of John J. Boland Distributing ("Boland"), a beverage distributor in Troy, New York, an auditor for the New York State Department of Taxation and Finance discovered a letter dated February 13, 1985 from VIP to Boland (152). This letter indicated, *inter alia*, that Boland was in the process of purchasing both hardware and software from VIP (264). The letter further advised Boland to "budget one to two days at $60.00 per hour for training and installation on the computer and software, as well as actual per diem expenses," and added that "[i]f [Boland] and VIP determine that an installer is needed on-site for additional data prep within 60 days of installation, VIP will provide that person at no charge" (264). A telephone call to Boland revealed that a VIP employee had come to Troy to install the purchased equipment and train employees on Boland's own premises (169, 247).

New York imposes sales or compensating use tax on purchases or sales of "tangible personal property," NY Tax Law §§ 1105(a), 1110. Although, during the period in question, software was not considered tangible personal property, computer hardware was considered tangible personal property and thus subject to tax (49a-50a). On the basis of the letter to Boland, the Audit Division of the Department of Taxation and Finance believed that VIP would be liable for tax on its sales of tangible personal property in New York State (152-154). Accordingly, auditors contacted Howard Aiken ("Aiken"), president of VIP (246-47). Aiken repeatedly refused either to

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[1]Parenthetical citations are to the Record on Appeal in the New York Court of Appeals. Parenthetical citations followed by "a" are to the appendix to the petition for certiorari.

register with New York as a vendor or permit the Audit Division to examine VIP's records (246-47). New York was thus forced to obtain Vermont and federal tax information for VIP from the appropriate taxing authorities and estimate VIP's New York tax on the basis of this information (247).

On November 27, 1987, the Tax Department issued to VIP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing use tax in the amount of $513,112.11 plus interest and penalty for the period from December 1, 1983 through November 30, 1986 (232). VIP protested this assessment (247). At a conciliation conference with Tax Department personnel, VIP agreed to permit an audit by Tax Department auditors (247). This audit was conducted on May 17, 1987, and resulted in a determination that VIP had made taxable sales of $1,216,744 to purchasers in New York during the audit period, producing a use tax liability of $85,172.08 plus statutory interest and penalty (238, 247). This liability was subsequently reduced to $73,275.04 plus interest and penalty (119).

On October 29, 1988, petitioner filed an administrative petition in the Division of Tax Appeals, contending, *inter alia*, that VIP was not liable under the Commerce Clause of the United States Constitution to collect and remit New York use tax (234-35). The Audit Division duly answered (241-42). On June 10, 1991, a hearing was held before Administrative Law Judge Jean Corigliano ("the ALJ"). At the hearing, the Audit Division introduced into evidence both the VIP letter to Boland and several VIP invoices to different beverage distributors in New York. An invoice to G.T. Britt's, Inc. of Athens, New York ("Britt's") revealed charges for "Service" that included "on-site hours," "travel hours," "lodging exp[ense]," "meals expense" and "travel expense" (265). An invoice to Plattsburgh Distributing ("Plattsburgh") included charges for "travel expense,"

mileage, taxi fare, ferry toll, "installation -- travel time," and "installation" time (268-270). A telephone conversation between Diane Carson ("Carson"), who conducted the audit, and Terry Lozier, bookkeeper for Plattsburgh, revealed that a VIP employee had come from Vermont to Plattsburgh to train Lozier in the use of the computer system (161, 270).

In addition to the invoices appearing in the record, Carson testified that many other invoices the auditors examined revealed VIP's presence in New York (164). Carson noted that the auditors had to conduct their on-site audit of VIP by examining individual sales invoices and were not given access to a photocopier at that time (163-64). The invoices that appear in the record were thus obtained "from other external sources" (172). In preparing the audit, however, the auditors compiled a list of other invoices that, in their view, revealed VIP's presence in New York (173-74). This list included some 81 additional invoices, of which 41 include charges for either "travel" or "site" time, signifying time spent by VIP employees at the customer's place of business (262-63).

At the hearing, Aiken described VIP's business in some detail. For customers who already own suitable computer hardware, VIP custom-designs software and trains the customer's employees in its use (181-82). According to Aiken, most of this training occurs at VIP's offices in Vermont (181-82), with perhaps only one percent of it occurring in New York State (203). VIP then usually ships the software to the customer, who installs it himself, although "some" software installation is done by VIP at a customer's place of business (206). For customers with no computer or inadequate hardware, VIP will purchase a suitable computer from IBM, MSI or one other company, install the custom-designed software, and resell the computer to the customer at a mark-up (182, 195-97, 202, 213).

Occasionally, Aiken indicated, a customer has problems with VIP's software. When this occurs, VIP attempts to remedy the problem either by a telephone consultation with the customer or by direct connection, via modem, with the customer's computer (182-83). For perhaps 5% of VIP's customers, however, an on-site visit by VIP employees is necessary to solve the problem (186). Aiken agreed that the invoices to Britt's and Plattsburgh reflect on-site visits by VIP personnel to their New York customers (192-93, 198-200, 209).

Aiken described VIP as obtaining business through word of mouth, as a result of distributors contacting VIP, after which VIP would mail its literature to the potential customer (180). Alison Templeton ("Templeton"), VIP's comptroller, described a somewhat different process. According to Templeton, VIP's contacts with its customers

> would basically be either word of mouth or national conventions. We would introduce ourselves. If someone was interested or if we heard that someone was interested, we would telephone them. To spark their interest further, they would get a brochure and in that brochure often we would have a contract. If they were more interested, we would encourage them to visit one of our other customers so they could see exactly how it operated. And if they became even more interested, we would often invite them to Vermont * * * (218).

On February 27, 1992, the ALJ issued a determination sustaining the assessment against petitioner. The ALJ concluded, *inter alia*, that VIP's presence in New York during the audit period, including its sales of more than $1 million in taxable property and the "not insignificant" number of visits to New York in connection with sales it had made, provided a

"sufficient nexus between New York and VIP" to justify imposition of use tax liability on VIP under the United States Constitution (62a-65a).

Petitioner filed a Notice of Exception with the Tax Appeals Tribunal ("the Tribunal") (108), which on January 21, 1993 issued a decision affirming the ALJ's determination. The Tribunal concluded, *inter alia*, that the activities of VIP's employees "created a sufficient nexus to impose a use tax liability for the sale of the computer hardware" (46a). Because VIP's employees come to New York to install, provide maintenance for or train customers in the use of VIP's customized software, its "physical presence" in the State "created sufficient nexus" (46a).

On May 20, 1993, petitioner commenced a proceeding pursuant to NY Tax Law § 2016 in the Appellate Division, Third Department (5). Respondent Commissioner of Taxation and Finance duly answered (56). On July 28, 1994, the Appellate Division issued a memorandum and judgment annulling the Tribunal's determination. The Appellate Division concluded that VIP lacks "sufficient contacts with New York to satisfy the constitutional prerequisites for imposing a duty to collect and remit use taxes" (287). The court noted that *Quill Corp. v North Dakota*, 504 US 298 (1992), prohibits the imposition of a duty to collect and remit use tax "upon a party having no 'physical presence' in the taxing state" (26a). The court found in *Quill* a constitutional requirement that an out-of-state vendor have a "substantial 'physical presence' " in a taxing state to justify imposition of sales or use tax under the Commerce Clause of the United States Constitution (28a). Accepting petitioner's statement that it is not "petitioner's ordinary practice to travel to its customers' places of business" and finding that petitioner made "no more than 30 or 40 . . . visits to New York over the

three-year period," the Appellate Division concluded that "[t]his activity, without more, does not rise to the level necessary to justify taxation" (27a).

Pursuant to NY CPLR § 5601(b)(1), respondent appealed to the New York Court of Appeals as of right (283). The case was consolidated with that of *Orvis Co., Inc. v Tax Appeals Tribunal*, 204 AD2d 916 (3d Dept 1994). On June 14, 1995, the Court of Appeals issued a decision reversing the Appellate Division's holding with respect to VIP. The Court of Appeals, recognizing that the Appellate Division based its decision on an interpretation of *Quill* as having "increased the requisite threshold of in-State physical presence [under the Commerce Clause] from any measurable amount of in-State people or property to *substantial amounts* of in-State people or property," (10a, *quoting Orvis Co., Inc.*, 204 AD2d at 917) (emphasis added by Court of Appeals), first undertook an examination of "the evolution of Supreme Court doctrine limiting the authority of a State to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce" (3a). As the Court of Appeals noted, prior to *Quill,* "the constitutionally required nexus between the taxing State and the activity, entity or property subject to the tax was applied indistinguishably for purposes of both Due Process and Commerce Clause analysis" (4a). In *National Bellas Hess, Inc. v Department of Revenue of Illinois*, 386 US 753 (1967), the state court observed, this Court "for the first time explicitly made some physical presence of the vendor in the taxing State a requirement under both the Commerce and Due Process Clauses for charging the vendor with the duty of collecting a use tax on mail-order purchases by residents of that State" (4a-5a). The Court of Appeals added that in *National Geographic Society v California Board of Equalization*, 430 US 551, 556

(1977), this Court concluded that "the required physical presence of the vendor in the taxing State must be more than the 'slightest presence'" (7a).

In *Quill*, the court below noted, this Court expressly "overruled so much of *Bellas Hess* as required some physical presence of the vendor as a 'minimum connection' in the taxing State to support the jurisdiction to tax under the Due Process Clause" (8a). This Court, however, retained the physical presence requirement under the Commerce Clause. The twofold justification for retaining this requirement, the Court of Appeals observed, was its furtherance of a bright-line test or " 'demarcation of a discrete realm of commercial activity that is free from interstate taxation,' " and the doctrine of stare decisis, which " 'counsels adherence to settled precedent' " (9a, *quoting Quill*, 504 US at 314, 317).

On the basis of its survey of this Court's decisions, the Court of Appeals concluded that *Quill* could not be read as imposing a requirement of a nonresident taxpayer's "substantial" physical presence in the taxing state. First, said the state court, "as a matter of simple logic and semantics, [this] Court was not applying a *substantial* physical presence requirement" in the many cases prior to *Quill* in which it upheld imposition of a state tax on interstate vendors with relatively little physical presence in the taxing state (10a) (emphasis in original). *Quill* itself, the court added, cannot possibly be construed as expanding the *Bellas Hess* "physical presence requirement," for even that modest threshold would, according to *Quill*, not be " 'dictated . . . were the issue to arise for the first time today' " (10a-11a, *quoting Quill*, 504 US at 311).

Moreover, the Court of Appeals said, treating *Quill* as imposing "an in-State substantial physical presence requirement . . . would destroy the bright-line rule [this] Court in *Quill* thought it was preserving in declining completely to overrule *Bellas Hess*," thus "undermin[ing] the principal justification" for the decision in *Quill* and requiring a case-by-case evaluation of the substantiality of each vendor's presence (11a). Finally, the Court of Appeals recognized that this Court, in its sole post-*Quill* sales tax decision, "did not apply a substantial physical presence test," and found sufficient physical presence of a vendor under the Commerce Clause "without even passing reference to the substantiality of the physical presence of the vendor" (11a, citing *Oklahoma Tax Commission v Jefferson Lines, Inc.*, ___ US ___, 115 S Ct 1331, 131 L Ed 2d 261 [1995]).

Thus, the Court of Appeals concluded that "the true import of the physical presence requirement . . . under contemporary Commerce Clause analysis" is that "[w]hile a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence' " (12a). Applying this standard, the court below held that VIP had not "sustained its definite burden of establishing immunity under the Commerce Clause from [its] tax collection obligation" (12a). Evidence in the record permitted the inference "that VIP's hardware and software sales agreements obligated it to provide a charge-free visit of a VIP computer software installer at its beverage-distributor customer's site in New York if problems necessitating the visit occurred within the first 60 days of installation" (14a-15a). "Moreover," the court added, "VIP's invoices showed charges for travel expenses to its New York customers' locations on 41 occasions . . . during the three year audit period, in which VIP had 154 taxable transactions in New York" (15a). These "trouble-shooting visits to New York

vendees" and VIP's "assurances to prospective customers that it would make such visits enhanced sales and significantly contributed to VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York" (15a). Thus, VIP's activities in New York were "of greater significance than merely a slightest presence," and justified imposition on VIP of a duty to collect compensating use tax (15a).

REASONS FOR DENYING THE WRIT

The decision of the New York Court of Appeals does not conflict with any decision of this or any other court.

After an exhaustive and scholarly review of the entire history of this Court's constitutional sales and use tax jurisprudence, the New York Court of Appeals concluded that *Quill Corp. v North Dakota* does not "make a *substantial* physical presence of an out-of-State vendor in New York a prerequisite to imposing the duty upon the vendor to collect the use tax from its New York clientele" (2a-3a). This holding comports fully with *Quill* and with the cases that precede and follow it. The supposed "conflicts with this Court's decisions," upon which VIP bases its petition for certiorari, are simply nonexistent.

Petitioner's first contention is based on misreading of both *Quill* and the decision below. According to petitioner (Petition, p 13), the Court of Appeals "determin[ed] that any physical presence beyond mail or common carrier in [New York] violates the 'bright-line rule' of *Bellas Hess* and gives rise to use tax liability.' " This, petitioner argues (Petition, pp 13-14), conflicts with *Quill*, for the taxpayer in *Quill* "had some physical presence in the State," but this physical presence was deemed too minimal to give rise to liability to collect use tax. Thus,

petitioner concludes (Petition, p 14), the Court of Appeals "misconceived the 'bright-line' rule," which "is not a bright line dividing mail and common carrier contacts with the State from all other contacts," but rather "divides physical presence from a vendor's insubstantial in-State activities."

This flatly misconstrues both the decision below and *Quill*. The Court of Appeals repeatedly acknowledged and relied on (7a, 12a, 14a) this Court's rejection in *National Geographic* of a "slightest presence" test for nexus. 430 US at 556; *see also, Quill*, 504 US at 315 n 8 (*National Geographic* "expressly rejected a 'slightest presence' standard of constitutional nexus"). Indeed, the precise holding below is that, under *Quill* and *National Geographic*, a vendor's physical presence in a taxing state "must be demonstrably more than a 'slightest presence' " (12a).

It was the Court of Appeals' meticulous reading of *Quill*, its predecessors and its progeny that enabled it both to extract this standard and to apply it to the facts in the present case. As the court below noted (10a), it is apparent "as a matter of simple logic and semantics" that the limited activities that justified imposition of tax on the out-of-state vendors in several pre-*Quill* decisions did not amount to a "substantial" physical presence. *See, Goldberg v Sweet*, 488 US 252 (1989) (interstate telephone carrier's billing to an in-state address for calls originating or terminating in the taxing State); *Standard Pressed Steel Co. v Washington*, 419 US 560 (1975) (solitary engineer-consultant operating an office in his home); *Scripto, Inc. v Carson*, 362 US 207 (1960) (ten part-time, nonexclusive, independent contractors soliciting sales on commission); *General Trading Co. v State Tax Commission*, 322 US 335 (1944) (Minnesota company sending Minnesota-based travelling salesmen to Iowa); *Felt & Tarrant Mfg. Co. v Gallagher*, 306 US 62 (1939) (two non-

employee commissioned sales solicitors). Similarly, as the Court of Appeals understood, the one case decided after *Quill* in this area cannot be read as imposing a "substantial" physical presence requirement. *See, Oklahoma Tax Commission v Jefferson Lines, Inc.*, ___ US ___, 115 S Ct 1331, 1338, 131 L Ed 2d 261 (1995) (" 'nexus aplenty' " for purposes of Oklahoma sales tax on interstate bus fare is found in facts that "Oklahoma is where the ticket is purchased, and the service originates there").

Quill, conversely, is best understood as an instance of truly minimal physical presence. In *Quill*, the sole physical manifestation of the out-of-state mail-order vendor was the presence in the taxing state of "a few floppy diskettes," 504 US at 315 n 8 -- six copies[2] of a software program licensed by the vendor to retailers in order to enable the retailers to check the company's current inventories and prices and place orders directly. 504 US at 302 n 1, 315 n 8. Such a presence, said this Court in *Quill*, "might constitute some minimal nexus," but is insufficient, without more, to "meet the 'substantial nexus' requirement of the Commerce Clause." 504 US at 315 n 8. At the same time, this Court emphasized in *Quill*, very little is necessary to make for the requisite physical presence. A "small" physical presence, such as "a small sales force, plant or office," may permit a State to "compel a vendor to collect a sales or use tax." 504 US at 315. This Court further noted that the standard it imposed for the requisite physical presence amounting to substantial nexus under the Commerce Clause was a "bright-line test," which "firmly establishes the boundaries of legitimate state authority,"

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[2]The decision in *Quill* does not make clear how many separate copies of the software program were extant in the taxing state, but the parties' briefs in that case establish that the number was six. *See*, Petitioner's Reply Brief at 15.

"reduces litigation concerning [sales and use] taxes," and "encourages settled expectations," thus "foster[ing] investment." 504 US at 315-316.

Quill likewise makes clear that, as the court below understood (6a), the requirement under the Commerce Clause that a nonresident taxpayer's activity have a "substantial nexus with the taxing State" derives from *Complete Auto Transit, Inc. v Brady*, 430 US 274, 279 (1977), where it is identified as one aspect of a four-part test pursuant to which a state tax is scrutinized under the Commerce Clause. *See, Quill*, 504 US at 311. There is no warrant whatever for conflating the "substantial nexus" requirement with a demand that a taxpayer have a "substantial physical presence" in the taxing State.

The decision below thus comports entirely with *Quill* and other decisions of this Court. On the one hand, the physical presence sufficient to impose sales or use tax on an out-of-state vendor must be more than "minimal." On the other hand, such a presence can be less than "substantial," as demonstrated by both the factual circumstances of the cases in which state taxes have been upheld and this Court's observation that a "bright-line, physical-presence requirement" is to be applied, 504 US at 317. A "substantial physical presence" standard of constitutional nexus, of the sort urged by petitioner, would, by contrast, leave the taxability of any given out-of-state enterprise open to question and require extensive case-by-case evaluation of a taxpayer's presence in the taxing State. In emphasizing the need for and the virtues of a bright-line test for nexus, this Court in *Quill* cannot have meant to endorse a test that draws no line of any sort. In the wake of *Quill*, the "bright line" must be drawn exactly where the Court of Appeals drew it: at a point "demonstrably more than a 'slightest presence' " (12a). VIP cannot seriously contend that its activities in New York -- including a

guarantee to New York customers that it will visit the customer's place of business if "needed," entailing at least 41 such visits over a three-year period, and giving rise to billing for New York visits on more than one-quarter of its New York invoices during that period -- fall on the nontaxable side of the bright line drawn correctly by the Court of Appeals.

Nor, as petitioner argues (Petition, p 15), is there any conflict between the decision below and this Court's decision in *Miller Bros. Co. v Maryland*, 347 US 340 (1954). *Miller Bros.* invalidated on due process grounds the imposition of state use tax on a vendor whose only physical presence in the taxing state consisted of "some" deliveries made with the vendor's own truck. *Id.* at 341. As the Court of Appeals recognized (8a, n 2), that case had nothing to do with the Commerce Clause. *See*, 347 US at 347 (Court expressly does not consider whether statute at issue "imposes an unjustifiable burden upon interstate commerce").

VIP next contends (Petition, pp 15-17) that the decision below improperly "equate[s] the 'substantial nexus' requirement of the Commerce Clause with the minimum contacts requirement applicable to the Due Process Clause." It is not entirely clear where petitioner detects this "equation." Petitioner argues, essentially, that the connection between VIP and New York does not even satisfy the supposedly "more lenient due process requirement," such that the "stricter Commerce Clause standard" cannot possibly be fulfilled. According to petitioner, because "the limited physical presence of VIP in New York [i.e., its visits in connection with the nontaxable software it sold] was wholly unrelated to the taxable transactions at issue [i.e. its sales of $1.2 million in computer hardware]," and because the Due Process Clause supposedly requires a higher threshold of contacts when the nonresident's activity on which jurisdiction is

based is unrelated "to the subject of litigation," there can be no "personal jurisdiction" over VIP's taxable sales on the basis of the unrelated activity.

To state this argument is simultaneously to refute it. First, the activities for which VIP may be held accountable in New York under the Due Process Clause are not "unrelated" to its taxable sales of computer hardware. VIP's argument ignores the fact that, as discussed above, liability under the Due Process Clause arises not from physical presence *per se* but rather from activities of any sort that are "purposefully directed" at the taxing state's market. VIP made no showing whatsoever that its aggressive and continuous solicitation of New York business did not include efforts to sell both hardware and software. Thus, the activities giving rise to VIP's liability under the Due Process Clause were intimately "related" to its taxable transactions in New York.

There is, moreover, no justification for VIP's treatment of the different standards under the Due Process and Commerce Clauses as essentially identical in kind and differing only in "leniency." As this Court emphasized in *Quill*, the two constitutional provisions "differ fundamentally" and "reflect different constitutional concerns." 504 US at 305. The Due Process Clause addresses the question of whether an out-of-state vendor has "subject[ed] itself to the State's *in personam* jurisdiction" by "purposefully avail[ing] itself of the benefits of an economic market in the forum State," notwithstanding the vendor's lack of "physical presence in the State." 504 US at 307. It is the vendor's economic "access to the State," not its physical presence *per se*, that matters. 504 US at 308. The Commerce Clause, by contrast, is "animated by different constitutional concerns and policies." 504 US at 312. Whereas "[d]ue process centrally concerns the fundamental fairness of governmental

activity," "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." 504 US at 312. It is thus not a matter of the two provisions imposing, as VIP would have it, weaker or "stricter" standards, but rather of their vindicating entirely different constitutional concerns and entailing an examination of factors that need not overlap.

Nor, indeed, does petitioner's argument on this point cohere even on its own terms. VIP, as noted above, makes much of the fact that its physical presence in New York, attributable to its nontaxable sales of software, was "unrelated" to the sales of computer hardware for which it was taxed. This is of no constitutional consequence. As this Court has made clear, "[t]he relevant constitutional test . . . is not whether the duty to collect the use tax relates to the seller's activities within the State," but rather whether there is a nexus " 'between [the State and] the *person* . . . it seeks to tax.' " *National Geographic*, 430 US at 561 (*quoting Miller Bros.*, 347 US at 344-45) (brackets, emphasis and ellipsis in *National Geographic*). Similarly, petitioner's argument hinges on its assertion (Petition, p 16) that the activities that subject an out-of-state vendor to taxation must be conducted continuously within the State. For more than fifty years, however, the law has been otherwise. *See, General Trading Co. v State Tax Commission*, 322 US 335, 337 (1944) (upholding Iowa use tax imposed on property "sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters").

There is, finally, no conflict between the decision below and *Wisconsin Department of Revenue v William Wrigley, Jr., Co.*, 505 US 214 (1992). This case has nothing whatever to do with the Commerce Clause or any other constitutional provision,

dealing instead with 15 USC § 381(a), which prohibits a State from taxing the income of a corporation whose only business activities within the State consist of "solicitation of orders" for tangible goods. This Court's holding that nontaxable "solicitation of orders" includes "activities that are *entirely ancillary* to requests for purchases," but not "those activities that [a] company would have reason to engage in anyway," regardless of its sales activities, 505 US at 228-229 (emphasis in original), has no bearing on the issues in the present case. Indeed, the most noteworthy aspect of *Wrigley* for present purposes is its congruence with the decision below. *Wrigley* held squarely that "employing salesmen to repair or service [a] company's products is not part of the 'solicitation of orders,' since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases* . . . ." *Id.* at 229 (emphasis in original). Even if, as petitioner contends (Petition, p 17), *Wrigley* stands for the *constitutional* proposition that "solicitation of orders" within a state by a nonresident vendor is "not a sufficient predicate for taxation" by that State, the fact remains that the repair and service work undertaken by VIP falls outside this statutory limitation.

There is likewise no conflict between the decision below and that of an intermediate appellate court in *Florida Department of Revenue v Share International, Inc.*, No. 93-4093, 1995 WL 492954 (Fla App Aug. 21, 1995). The case holds only that the abbreviated physical presence in Florida of an out-of-state vendor did not, "under the circumstances," establish a substantial nexus with Florida under the Commerce Clause. The decision, like that of the New York Court of Appeals, recognizes no more than that, under *Quill*, an out-of-state vendor that has some physical presence, however minimal, in the taxing state, does not invariably subject itself to state sales or use tax.

There is no conflict between this holding and the decision below. The Florida court, moreover, immediately certified the nexus question that arose in *Share International* to that State's Supreme Court. If the case eventually produces a conflict of some sort, it can be addressed via a grant of certiorari in that case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
October 17, 1995

Respectfully submitted,

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(3)

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COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

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On Petition For Writ Of Certiorari To The New York Court of Appeals

REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

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1. Respondent does not deny that the issue before this Court — whether, consistent with the Constitution, a state may impose a use tax collection obligation on an out-of-state seller that lacks a substantial presence in the taxing state — is both important and likely to recur.

2. Nor does respondent deny that the New York Court of Appeals expressly rejected the requirement of substantial physical presence for imposition of a use tax collection obligation. This Court consistently has permitted states to impose use tax collection obligations only on those out-of-state vendors with a substantial physical presence in the taxing state. *Compare, e.g., Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939) (upholding imposition of sales tax where out-of-state vendor had

salespersons in the taxing state), *with Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) (rejecting imposition of a use tax where out-of-state vendor was present in the state on an occasional basis to make deliveries with its own truck). Likewise, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court held that Quill's limited in-state presence did not constitute "substantial nexus."

Far from giving *Quill* a "meticulous reading," as respondent claims (Resp. Br. in Opp. at 11), the court below could only "extract" its standard, *id.*, by redefining the law in this area. According to the court below, all that is required to satisfy the Commerce Clause is a "minimum connection physical presence." App. 10a. In *Quill*, however, this Court recognized that far more presence is required, stating that "whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." 504 U.S. at 315. Thus, the decision below, rather than "comport[ing] entirely with *Quill*" as respondent claims (Resp. Br. in Opp. at 13), is in direct and obvious conflict with this Court's holding in *Quill*.

3. Respondent does not dispute the essential facts in this case: that VIP has no sales force, officers, agents, or delivery trucks in New York State, and that the sporadic and occasional visits by its out-of-state employees to New York State relate only to software, rather than the hardware upon which New York State imposed the use tax collection obligation.

4. Respondent also errs in treating *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), as both overruled and irrelevant. While that case arose in the Due Process context, this Court has cited it with approval as delineating the Commerce Clause requirements. *See, e.g., National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 558-59 (1977) (discussing physical presence at issue in *Miller Bros.* as insufficient to establish requisite nexus). In *Miller Bros.*, despite the out-of-state vendor's obvious presence in the state through

delivery trucks, this Court held that the requisite nexus was lacking even under the more lenient Due Process standard.

Respondent does not dispute that, if *Miller Bros.* remains good law, it is in conflict with the decision below, in light of the only slight in-state physical presence of the out-of-state vendor in this case. At the same time, respondent suggests (Resp. Br. in Opp. at 15-16) that the Due Process Clause standard for permitting the imposition of a use tax collection obligation on an out-of-state seller is no less stringent than the Commerce Clause standard. But this Court explicitly made clear in *Quill* that the Commerce Clause requires more of a connection with the State than does the Due Process Clause: "Accordingly, contrary to the State's suggestion, a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Quill*, 504 U.S. at 313.

The decision below also is in conflict with this Court's personal jurisdiction cases. Those cases hold that unrelated insubstantial activities in the forum state are insufficient to sustain personal jurisdiction under the Due Process Clause. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984). As a result, such activities surely cannot satisfy the more stringent Commerce Clause standard.[1]

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[1] Respondent's suggestion (Resp. Br. in Opp. at 16) that *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944) held that an out-of-state seller's sporadic activities in the state may give rise to a use tax collection obligation, even where, as here, those sporadic activities are unrelated to the subject of the tax, is flatly wrong. There, contrary to respondent's claim, this Court upheld, under the Commerce Clause, a use tax collection obligation that arose from goods sold in the taxing state by the out-of-state vendor's traveling salesmen. *Id.* at 337. But, as this Court recognized in *Quill*, the presence of a sales force in the taxing state, far from sporadic or unrelated to the subject of the tax, is an instance of substantial physical presence. 504 U.S. at 315; *see Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960).

5. Respondent fails wholly to comprehend the importance of this Court's decision in *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214 (1992), to this case. While repair activities fall outside the protection of the federal statute governing state taxation of income, Public Law 86-272 (codified at 15 U.S.C. § 381), *see* 505 U.S. at 229, this Court's decision in *Wrigley* makes clear that sporadic in-state activities are insufficient to give rise to state income tax liability. 505 U.S. at 231-32. This Court previously has recognized that its decisions in the use tax area are similar to Public Law 86-272, *see Quill*, 504 U.S. at 316 n.9, lending additional support to the conclusion that sporadic in-state activities are not sufficient to give rise to a use tax collection obligation.

6. This case presents important issues, prompt resolution of which is critical to allow both businesses and states to order their affairs.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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